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Shared Services Partnership
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Welsh Health Building Note

2018 Estatecode Wales

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Intranet: **http://howis.wales.nhs.uk/ses**

Internet: **http://www.wales.nhs.uk/ses**

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This guidance is based on the Health Building Note 00-08 *Part B: 2014 Supplementary information for Part A*, published by the Department of Health.

It replaces HBN 00-08 *Estatecode Wales Edition 2009 and Estatecode supplement: Land and property appraisal and estate performance indicators. Welsh edition 2010.*

This publication can be accessed from the NHS Wales Shared Services Partnership – Specialist Estates Services website **www.wales.nhs.uk/ses**

Welsh Health Building Note 00-08 : 2018 Estatecode Wales

Overview

WHBN 00-08: 2018 *Estatecode Wales* provides detailed advice about the active management of land and property used for healthcare services. By using this information, NHS organisations in Wales should be able to secure efficient and effective property solutions through the use of property resources in order to deliver better health and social care in addition to developing opportunities to achieve efficiency savings and reduce costs.

This edition includes advice on:

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

To obtain best value from property assets, NHS organisations in Wales have to take a proactive role (especially in relation to town planning and sustainability) and carry out their property undertakings to a high standard.

It replaces HBN 00-08 *Estatecode Wales Edition 2009*.

Where further advice is needed please contact NHS Wales Shared Services Partnership – Specialist Estates Services at:

Intranet: **http://howis.wales.nhs.uk/sites3/home.cfm?orgid=254**

Internet: **http://www.wales.nhs.uk/ses**

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WHBN 00-08: 2018 *Estatecode Wales*, is based on the Department of Health HBN 00-08 Part B: October 2014 *Supplementary information for Part A*. NHS Wales Shared Services Partnership – Specialist Estates Services is grateful to the Department of Health for permission to adapt the original guidance for application in Wales. The contents of the original document were reviewed by NHS Wales Shared Services Partnership – Specialist Estates Services and by representatives of Health Boards and Trusts in Wales and by Welsh Government.

NHS Wales Shared Services Partnership – Specialist Estates Services wishes to express thanks to the following contributors:

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Chapter 1

Guidance and powers

Scope and purpose of guidance

1.1 *Estatecode Wales* provides best-practice guidance to NHS organisations in Wales on all aspects of managing their estate.

1.2 It covers a range of issues including legal, financial, regulatory, statutory and administrative.

1.3 *Estatecode Wales* performs the following key functions:

- Informs decisions about buying, selling or leasing of land and property;
- Sets out what constitutes mandatory as opposed to discretionary guidance;
- Details the requirements for the procurement of new facilities and services;
- Informs day-to-day management decisions.

Target audience

Organisations

1.4 The following organisations should read Estatecode:

- NHS Trusts;
- Health Boards;
- Shared services organisations - The Specialist Estates Services and Legal and Risk functions within NHS Wales Shared Services Partnership need to be familiar with the contents of *Estatecode Wales* and operate within its parameters;
- The Welsh Government's Health and Social Services Group;
- Any other public body associated with the delivery of healthcare facilities.

Individuals

Chief executives

1.5 Chief executives are responsible for the estate their organisation owns or manages.

1.6 Whilst responsibility is likely to be delegated, chief executives should be aware of the guidance contained in Estatecode.

1.7 Chief executives should be familiar with this document particularly the sections on powers (see **paragraphs 1.27 – 1.61**) and leadership and governance (see **paragraph 2.5**), and should be generally aware of the issues that Estatecode Wales covers.

Board members

1.8 Management of the estate is an area that needs detailed consideration at board level.

1.9 All board members should be familiar with Estatecode Wales particularly the sections on guidance and powers (see **paragraphs 1.27 – 1.61**), and should be generally aware of the issues that *Estatecode Wales* covers.

Directors of estates and facilities (and their teams)

1.10 The person responsible for strategic planning and day-to-day operation of healthcare facilities should have a thorough understanding of Estatecode. This person will often (though not always) be a director of estates/facilities.

1.11 The director of estates and facilities should ensure that his/her estates and facilities team, as well as any external advisers, are also familiar with Estatecode.

Clinicians and other NHS staff

1.12 *Estatecode Wales* will give clinicians (and other NHS staff) a general appreciation of Welsh Government policies governing land and property transactions.

External advisers

1.13 One of the purposes of *Estatecode Wales* is to help NHS organisations identify when support is required from internal or external professional advisers. Those advisers (property consultants, solicitors, valuers etc.) need to be familiar with the provisions of Estatecode.

Auditors

1.14 Auditors should be familiar with *Estatecode Wales* in order to be able to judge whether schemes have been carried out in a proper manner.

The policy context

1.15 The Welsh Government's aim is to improve the health and well-being of the population through available resources. This includes providing more services in primary and community care settings with the aim of bringing services closer to home and reducing pressure on hospitals. NHS organisations have a responsibility to:

- ensure that their land and property is used effectively to support the Welsh Government's strategic plans for health and social services and to support the clinical needs of the local population;

- provide and maintain an appropriate level of affordable healthcare facilities in the right location, which are fit for purpose, support the provision of quality healthcare and are sustainable over their lifecycle. This should be in line with organisational plans and policies;

- consider, where possible, opportunities for partnerships in discussion with local authorities and third sector organisations. NHS organisations should also consider innovative models that result in more efficient use of assets.

1.16 The Welsh Government is committed to Sustainable Development and it is important that the impact of new and existing healthcare facilities is carefully considered on the basis of economic, social and environmental factors.

1.17 *The Well-being of Future Generations (Wales) Act 2015* places a duty on public bodies to think more about how they are delivering the requirements of the Act and contributing to the seven 'Goals' in the Act. These are set out below: (see **Figure 1**)

- A prosperous Wales
- A resilient Wales
- A healthier Wales
- A more equal Wales
- A Wales of cohesive communities
- A Wales of vibrant culture and thriving Welsh language; and
- A globally responsible Wales

Well-being Goals

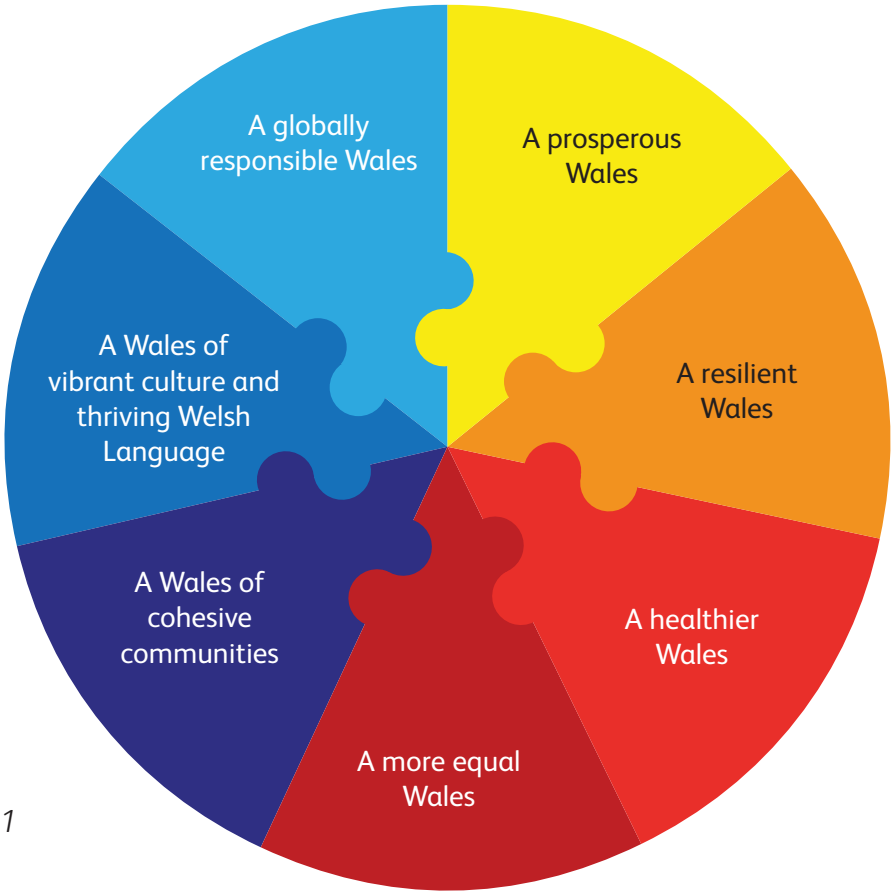

Figure 1

1.18 When addressing estate matters, it is important for NHS organisations to reduce the environmental impact of their operations (both existing and new builds/refurbishments). *The Environment (Wales) Act 2016* strengthens the legislative framework and across the Welsh Government the target is to achieve a minimum of an 80% reduction in greenhouse gas emissions by 2050.

1.19 The Welsh Government is keen to promote a move away from traditional adversarial contracts towards contracts built on longer-term collaborative arrangements, which allow shared learning and mutually beneficial relationships to flourish.

1.20 Use of the *NHS: Building for Wales* framework is mandatory for all construction procurement projects with estimated works costs in excess of £4M excluding VAT.

1.21 NHS organisations must comply with all Welsh statutory requirements and those UK, national and international statutory requirements and directives which apply, or are enacted, in Wales.

Guidance and powers

The fundamentals of decision-making

1.22 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 NHS Wales Shared Services Partnership – Specialist Estates Services (SES) should be obtained prior to proceeding with any land and property transactions.

1.23 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.

1.24 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.

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

Principles of ethical business conduct

1.26 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 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

1.27 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 health economy.

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

1.29 NHS organisations may own, acquire, sell or lease land in their own right, however, Health Boards need to obtain prior consent from the Welsh Government to do so.

1.30 NHS Trusts and Health Boards are statutory creations. Under the law of England and Wales, they only have the powers expressly given to them by or through the Welsh Government, or those necessarily implied as a result of what they have to do in order to fulfil their functions. These powers are subject to delegated limits, either set out in Establishment Orders, Directions, or from time to time by the Welsh Government (see **paragraphs 1.45 – 1.48** on delegated limits).

Health Boards

1.31 Health Boards are established by the *Local Health Boards (Establishment) Order 2003.*

1.32 Health Boards should note the provisions of the *National Health Service (Wales) Act 2006 Schedule 2 Para 13* which states:

"(1) Subject to sub-paragraph (3), a Local Health Board may do anything which appears to it to be necessary or expedient for the purposes of or in connection with its functions.

(2) In particular, it may

(a) acquire and dispose of property;

(b) enter into contracts;

(c) accept gifts of property (including property held on trust, either for the general or any specific purposes of the Local Health Board or for any purposes relating to the health service).

(3) A Local Health Board may not do anything mentioned in sub-paragraph (2) without the consent of the Welsh Ministers (which may be given in general terms covering one or more descriptions of case)."

Guidance and powers

NHS Trusts

1.33 NHS Trusts are established by a statutory instrument pursuant to Section 18 of the *National Health Service (Wales) Act 2006* (previously Section 5 of the *National Health Service and Community Care Act 1990*). Their general powers are set out in Schedule 3 paragraph 14 of the 2006 Act (previously Schedule 2 paragraph 16 of the 1990 Act).

(1) An NHS Trust may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with its functions.

(2) In particular, it may acquire and dispose of property…

1.34 The power is linked to the NHS Trust's functions.

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

1.36 NHS Trusts may not mortgage or charge any of their assets, or use them in any way as security for a loan (Schedule 4 paragraph 3(3) of the *National Health Service (Wales) Act 2006* – previously Schedule 3 paragraph 1 of the N*ational Health Service and Community Care Act 1990*).

1.37 NHS Trusts have income generation powers (see **paragraphs 1.39 – 1.41** for details).

The Welsh Ministers

1.38 The Welsh Ministers power is set out in Section 159 of the NHS Act 2006:

1) The Welsh Ministers may acquire

(a) any land, either by agreement or compulsorily,

(b) any other property, required by them for the purposes of this Act.

(2) In particular, land may be so acquired to provide residential accommodation for persons employed for any of those purposes.

(3) The Welsh Ministers may use for the purposes of any of the functions conferred on them by this Act any property belonging to them by virtue of this Act, and they have power to maintain all such property.

(4) A local social services authority may be authorised to purchase land compulsorily for the purposes of this Act by means of an order made by the authority and confirmed by the Welsh Ministers.

Income generation powers

1.39 Schedule 3 paragraph 20(1) of the *National Health Service (Wales) Act 2006* (previously Schedule 2 paragraph 15 of the *National Health Service and Community Care Act 1990*) gives powers to NHS Trusts (from 1 April 2005) 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.

1.40 Income-generation activities must not interfere with the duties and performance of NHS organisations.

1.41 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).

The decision-making process

1.42 Subject to delegated limits where applicable (see **paragraphs 1.45 – 1.48**) and the requirement to exercise their powers properly (see **paragraphs 1.49 – 1.61**), 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.

1.43 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;
- Welsh Government 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.

1.44 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

1.45 Each NHS organisation is subject to certain delegated limits. Above these limits, the NHS organisation is required to obtain the approval of the Welsh Government to the proposed transaction.

1.46 The delegated limit applies to freehold and leasehold acquisitions and the amount of disposals proceeds that can be retained by NHS organisations.

1.47 All acquisitions and disposals by Health Boards of any limit, and the acceptance of gifts and property, must receive the written approval of the Welsh Government before being entered into.

1.48 Currently, NHS organisations (both Health Boards and Trusts) may retain up to £500,000 from any single disposal after the deduction of direct disposal costs. Where a surplus site is sold in more than one lot all sale proceeds from the site will be aggregated for the purpose of calculating the £500,000 retention sum. Should advice be required Specialist Estates Services should be contacted prior to the commencement of any proposed disposal.

The proper exercise of powers

1.49 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. 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?

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

Legality

1.51 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.

1.52 However, the obligations may take other forms. Of particular importance to the NHS will be the impact of Directions from the Cabinet Secretary for Health, Well-being and Sport (Health Secretary) and limits on capital transactions. If a NHS organisation carries out a property transaction above its delegated limits without seeking Welsh Government approval, it may be acting illegally.

Rationality

1.53 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

1.54 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.

Guidance and powers

1.55 Case law from challenges to NHS decision making has emphasised the width of engagement required. Although the courts have recognised the need for any engagement to be proportionate to the scale of the change, it also needs to be real and meaningful. Consultation must always take place at a stage when it can influence the decision.

1.56 In some cases, consultation with a patient forum 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 with Community Health Councils.

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

1.58 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 a land and property;
- processes for affixing the organisation's or the Welsh Minister's seal when required.

Important:
Any person signing a contract in respect of a land and/or 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

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

1.60 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.

1.61 Another area where policy statements may well give rise to legitimate expectations is the application of the Crichel Down rules (see **paragraphs 4.22 – 4.31**).

Procurement of new facilities and services

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

1.63 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 **Chapter 2** and **Chapters 4 – 8.**

EU rules on procurement

1.64 NHS organisations are subject to the European Procurement Rules ("EU Rules") – EC *Directive 2014/24/EU* and the *Public Contracts Regulations 2015*– 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.

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

1.66 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.

1.67 If an NHS organisation has any input to define the type of work, or has a decisive influence into the 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.

Land and property transactions

1.68 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.

1.69 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.

1.70 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.

1.71 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

1.72 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).

1.73 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.

1.74 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.

1.75 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.

1.76 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.

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

Guidance and powers

Public services contracts

1.78 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.

1.79 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.

1.80 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. Again, professional (especially legal) advice should be sought if there is doubt over whether the EU Rules will apply.

Procuring works, goods or services – asset maintenance

1.81 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, contact NHS Wales Shared Services Partnership – Procurement Services or visit the National Procurement Service - **http://nps.gov.wales** or Crown Commercial Service - **https://www.gov.uk/government/organisations/crown-commercial-service** websites.

1.82 Many purchases require professional advice and support from NHS Wales Shared Services Partnership – Procurement Services, either locally or centrally. The asset manager must lead professionally but use this support and expertise wisely.

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

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

1.85 Professional advice should be sought from NHS Wales Shared Services Partnership - Procurement Services and/or Legal and Risk Services if there is any doubt whether a procurement is subject to EU Rules.

Chapter 2

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 – 6.45**).

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 **https://www.nice.org.uk/guidance/ph13** 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 This chapter 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.

2.2 Active management of land and property is fundamental to the overall success of an organisation. The management of land and property should support the service objectives of NHS organisations.

2.3 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 all NHS organisations and Specialist Estates Services, who 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.

2.4 Clinical service strategies should lead the future development of the estate. NHS organisations should aim to 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.

Management of land and property

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;
- that the accommodation complies with all relevant legislation and regulations.

2 Management of land and property

Understanding the estate

The current estate

2.7 NHS organisations 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 lease, licence 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 and Facilities Performance Management System (EFPMS) annual returns;
- an analysis of environmental impact assessments;
- 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:

- EFPMS;
- five-facet survey reports;
- lifecycle investment planning;

Management of land and property

- Care and Social Services Inspectorate Wales (CSSIW) reports relevant to the estate.

EFPMS data

2.11 EFPMS data should be treated as the standard first step when analysing estates data.

2.12 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 achieved in the management of the estate.

2.13 Data is collected for the following areas:

- Organisation-wide basis:
  - organisation profile
  - contracted-out services
  - finance
  - staff
  - transport services
  - cleanliness
  - food, laundry and linen.
- On a site-specific basis:
  - areas
  - age profile
  - combined heat and power
  - water service
  - waste
  - car-parking
  - five-facet survey information:

- physical condition
- functional suitability
- space utilisation
- fire and health & safety requirements
- energy performance.

2.14 Where there are any deficiencies or serious concerns outlined by the EFPMS 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 the NHS organisation'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 objectives of contributors to health and social care delivery. This may often involve 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 It is important that health 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 estate strategy should be reviewed annually using EFPMS data and the information from the five-facet survey. 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 NHS organisations 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 NHS organisations are encouraged to support balancing of the national grid through Demand Side Response (DSR) 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.

Note:
Healthcare organisations should understand the design and operational implications of participating in the DSR framework and such decisions need to be discussed with the Electrical Safety Group as detailed in WHTM 06-01: Electrical services supply and distribution.

Management of land and property

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 (depreciation costs);
- planned and unplanned maintenance expenditure.

2.24 Capital charges within NHS Wales only comprise depreciation costs, which vary according to the age of the asset. They represent the cost of "using up" 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)

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 where a commercial arrangement applies;

- 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 paid 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) code of practice *Service charges in commercial property (2014)*. 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.

2.32 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.

2.33 The RICS guidance identifies what should and should not be included in the service charges and methods of apportionment. It also recommends that management fees should comprise only the reasonable costs and overheads borne in the process of operating and managing the services.

2.34 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

2.35 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**).

2.36 Appropriate legal, surveying and professional advice should be obtained from Specialist Estates Services prior to proceeding with any freehold or leasehold land and property transactions. Following completion of any such transaction, Specialist Estates Services should be informed and provided with copies of the legal documentation.

Land and property records

2.37 NHS organisations 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.

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

2.39 Records 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

2.40 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.

2.41 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.

2.42 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.

2.43 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.

2.44 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 Cadw.

Maintenance

Land and property

2.45 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, legionella and fire inspections. There are criminal sanctions for failure to comply. Inspections must be carried out at intervals specified by the legislation.

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

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

2.48 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.

2.49 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

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

2.51 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.

2.52 The cost of boundary maintenance should be weighed against the required security and resulting benefits (see **paragraphs 2.67 – 2.83**).

2.53 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 contracts

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

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

2.56 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.

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

2.58 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.

2.59 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.

Management of land and property

2.60 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.

2.61 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.

2.62 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.

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

2.64 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.

2.65 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

2.66 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.

2.67 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;
- air conditioning;
- legionella 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

2.68 NHS organisations should produce and implement a security strategy in accordance with NHS 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 standards and Secured by Design (**www.securedbydesign.com**) guidance.

2.69 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.

Management of land and property

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

2.71 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.

2.72 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.

2.73 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 **paragraphs 2.49 – 2.52** on boundaries.

2.74 A checklist of vacant land and property issues (for example key holder, mothballing/ maintaining services, perimeter security, building security, insurance 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.

2.75 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

2.76 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".

2.77 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.

Management of land and property

2.78 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

2.79 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.

2.80 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.

2.81 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.

2.82 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.

2.83 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 2.75 – 2.77**).

2.84 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* and Welsh Government guidance which can be found at: **http://gov.wales/topics/people-and-communities/communities/communitycohesion/gypsytravellers/?lang=en**

Health and safety requirements

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

2.86 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.

2.87 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.

2.88 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

2.89 NHS organisations in Wales do not need to purchase commercial insurance to cover their property portfolio, but rather should subscribe to the Welsh Risk Pool (WRP) Scheme.
Further details of the scheme can be found on the NHS Wales Intranet (for those who have access) at:
http://nww.sharedservicespartnership.wales.nhs.uk/home

2.90 WRP cover extends to empty buildings subject to conditions requiring risk assessment and inspection (WRP Technical Note 25).

2.91 The WRP Scheme provides only limited cover for property damage. A provisional limit of £3M has been set (subject to review).

2.92 For example, if a hospital were seriously damaged by fire and had to be demolished and rebuilt, the WRP would not cover all of that cost. In this event, the NHS organisation would need to discuss with the Welsh Government the best way to proceed in terms of strategic planning etc. before any funding decisions could be made.

2.93 Buildings owned by an NHS organisation capable of single occupancy but leased or rented to a non-NHS occupier will not be covered by WRP indemnity. Insurance by the tenant should be a condition of the lease or occupation agreement and evidence of insurance should be requested.

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

- in the case of buildings insurance – 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. In appropriate circumstances, NHS organisations may seek landlord's approval to self-insure under the Welsh Risk Pool scheme (see **paragraphs 2.88 - 2.93**).

- 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.

Note:
In all circumstances where the purchase of commercial insurance is being considered, the NHS organisation involved should first consult with the Welsh Risk Pool.

Sustainability management

2.95 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 all aspects of sustainability and environmental management. Active sustainability management would include:

- 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;

- climate change resilience, mitigation and adaptability planning.

2.96 All NHS Health Boards and Trusts are required to have in place certification to the environmental management standard BS EN ISO 14001 which will form a framework for driving forward environment management and improvement plans.

2.97 NHS organisations should be aware of the current legal, statutory, government mandatory policy and guidance for sustainability, including but not limited to:

- Sustainability - the principal, overarching legislation governing sustainability in the public sector in Wales is the *Well-being of Future Generations (Wales) Act 2015*. The Act is designed to improve the social, economic, environmental and cultural well-being of Wales. It requires public bodies listed in the Act to set and publish well-being objectives, to publish a statement when setting these well-being objectives explaining how it will help them achieve the Act's goals and how it has applied the sustainable development principle. Each year public bodies must publish an annual report showing the progress they have made in meeting their objectives.

- Energy & Carbon – there is a wide range of existing regulation and legislation covering energy, carbon and climate change. The key element, which is set out in the *UK Climate Change* Act 2008 and the *Environment (Wales)* Act 2016, is the requirement to ensure the UK cuts its carbon emissions by 80% by 2050 (40% by 2020). The 80% target is set against a 1990 baseline. Additionally, the *Climate change strategy for Wales* (Welsh Assembly Government 2010a) sets out a 3% year-on-year reduction target for greenhouse gases (baselined against a 2006-10 average)

- Waste - there is a wide range of existing regulation and legislation covering waste management. The over-arching aims for waste and resource management in Wales are set out in the Welsh Assembly Government's *Towards zero waste* strategy (2010b) which has a long-term target to achieve zero residual waste by 2050 and an interim target by 2025 of 70% reuse and recycling. Detailed guidance on the various regulatory requirements for waste in healthcare can be found in WHTM 07-01:2013 *Safe management of healthcare waste.*

- Planning - the key policy requirement is that all new healthcare buildings funded by Welsh Government commit to achieving an EXCELLENT rating (assessed under *BREEAM UK new construction. Non-domestic buildings (Wales)* 2014, or equivalent standard) and all refurbishments commit to achieving a VERY GOOD rating (assessed under BREEAM Non-Domestic refurbishment and fit-out, or equivalent).

- Building Regulations – all building developments are required to comply with building regulation requirements, particular reference should be made to Part L2A and Part L2B *Conservation of fuel and power* (Welsh Government 2014), which places demands on new buildings to become low carbon and more sustainable in their design.

2.98 More in-depth advice and guidance is available from Specialist Estates Services who are the main point of expertise for resources, tools and policy advice with regard to environmental management, sustainability and carbon reduction.

2.99 A further reference resource for NHS Wales organisations is the suite of Welsh Health Technical Memoranda (HTMs and WHTMs) published as guidance and best practice for NHS Wales, comprising:

- Welsh Health Technical Memorandum 07-01: 2013 *Safe management of healthcare waste*, which provides advice on effective waste management of the operational estate;

- Health Technical Memorandum 07-02:2015 EnCO2de - *Making energy work in healthcare* which provides advice on efficient energy/ carbon management of the operational estate;

- Health Technical Memorandum 07-04:2012 *Water management and water efficiency*, which provides advice on efficient water management of the operational estate;

Management of land and property

- Health Technical Memorandum 07-07:2011 *Sustainable health and social care buildings*, which provides advice on the sustainable planning, design, construction and refurbishment of healthcare facilities.

Energy performance certificates

2.100 An Energy Performance Certificate (EPC) is needed whenever a property is:

- built
- sold
- rented

2.101 It is a legal requirement for an EPC to be ordered for potential buyers and tenants before a property is marketed for sale or rent.

2.102 An EPC contains information about a property's energy use and makes recommendations about how to improve its performance, reduce energy use and save money.

2.103 An EPC gives property an energy efficiency rating from A (most efficient) to G (least efficient) and is valid for 10 years.

2.104 The majority of properties require an EPC. However, certain buildings are exempt. These include properties that are:

- listed or officially protected and the minimum energy performance requirements would unacceptably alter it
- a temporary building only going to be used for two years or less
- used as a place of worship or for other religious activities
- industrial sites, workshops or non-residential agricultural buildings that doesn't use much energy
- a detached building with total floor space of less than 50 square metres
- due to be demolished by the seller or landlord and they have all the relevant planning and conservation consents.

2.105 For further guidance visit: **https://www.gov.uk/energy-performance-certificate-commercial-property/exemptions**

Management of land and property

Minimum energy efficiency standards

2.106 Minimum Energy Efficiency Standards (MEES) are to be introduced under the *Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015*, SI 2015/962.

2.107 The Regulations set out the minimum level of energy efficiency for private rented property in England and Wales. In relation to the non-domestic private rented sector, Part 3 of the Regulations contains the minimum level of energy efficiency provisions, which is currently set at an energy performance certificate (EPC) rating of at least 'band E'.

2.108 From 1 April 2018, landlords of non-domestic private rented properties (including public sector landlords) may not grant a tenancy to new or existing tenants if their property has an EPC rating of band F or G (shown on a valid Energy Performance Certificate for the property).

2.109 From 1 April 2023, landlords must not continue letting a non-domestic property which is already let if that property has an EPC rating of band F or G.

2.110 The Department for Business, Energy & Industrial Strategy published (February 2017) detailed guidance (DBEIS / NDPRLG) which can be found at: **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656541/Non-Dom_Private_Rented_Property_Minimum_Standard_-_Landlord_Guidance.pdf**

Easements and wayleaves

2.111 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.

2.112 An easement or 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.

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

2.114 Utility companies have their own agreements to deal with easements and wayleaves and legal advice should be taken on these agreements.

2.115 NHS organisations should identify all utility facilities on their site, note their exact location,and negotiate a new agreement if no legal documentation exists.

Management of land and property

2.116 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.

2.117 Points for NHS organisations to consider, and take appropriate professional advice on, when negotiating easement agreements and wayleaves 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 an appropriate level of consideration;
- 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.

2.118 Where it is necessary for an NHS organisation 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. Valuation and legal advice should be taken over the level of any compensation payments being sought in these circumstances.

2.119 Particular care is needed if an NHS organisation is considering entering into a lease with a telecommunications company given the extensive statutory protection these arrangements enjoy (see **paragraphs 6.53 - 6.61**).

Compulsory purchase of NHS property

2.120 NHS-owned property may, like other land, be the subject of compulsory purchase order (CPO) powers exercised by an acquiring authority (such as councils and the Welsh Government).

Management of land and property

2.121 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 acquiring authority in relation to a CPO, contact should be made with the Head of Property at Specialist Estates Services and specialised legal and valuation advice should be obtained immediately.

2.122 Land held in the name of the Welsh Ministers, 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 acquiring authority should be informed accordingly. Normally, any sale to it is by agreement.

2.123 Health organisations 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 Welsh Ministers' support should be obtained for the discontinuance of the CPO. Again, specialist advice must be obtained in respect of this matter.

2.124 NHS organisations should co-operate with the acquiring authority promoting the CPO to achieve a negotiated settlement.

2.125 The CPO process for National Significant Infrastructure Projects is different (see **paragraph 3.56**). 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

2.126 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.

2.127 Such areas of land may be vulnerable to an application being made to the Commons Registration Authority (see sections 52-54 of the *Planning (Wales) Act 2015*) for registration as a town or village green – particularly in Wales where land currently has less protection than England. 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.

2.128 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?

2.129 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. "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. The applicant does not need to be a local resident.

2.130 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. Case law is still evolving in this area and NHS organisations are recommended to take professional advice.

2.131 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 in Wales 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 two years before the date of the application, i.e. if recreational activities are prevented by the landowner, local residents have two years within which to submit a town or village green application.

2.132 Under the *Commons Act 2006*, as amended by the *Planning (Wales) Act 2015*, the right to apply to register land as a town or village green in Wales ceases if certain trigger events occur, which include the:

(a) grant of planning permission for the land;

(b) making a local development order;

(c) granting of a development consent order.

2.133 For each trigger event, there are a number of corresponding terminating events also set out in Schedule 1B. 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.

2.134 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.

Management of land and property

Procedure to register a town or village green

2.135 An application to register a town or village green may be made by anyone 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 local authority in the area pursuant to S.4(1)(d) of the *Commons Act 2006*.

2.136 An applicant is expected to prove their 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.

2.137 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.

2.138 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.

2.139 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

2.140 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.

2.141 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. This will prevent future development of the land where this would be incompatible with its recreational use.

Practicable preventative steps

2.142 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.

Erection of notices

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

Management of land and property

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

2.145 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.

2.146 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 Trust / Health Board only";
- "The walking of dogs, playing games or other recreational activities are not allowed on the property of xxx Trust / Health Board / this field".

2.147 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."

2.148 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.

2.149 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 two-year period of grace allowed for town or village green applications for each site.

Maintenance of boundaries

2.150 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 and notices affixed to the fence. See **paragraphs 2.49 – 2.52** and **2.128 - 2.133** for further details.

Management of land and property

Leasing or licensing land for public use

2.151 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.

2.152 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

Note:
Whilst the Localism Act 2011 and the provisions relating to assets of community value extend to Wales, the provisions relating to assets of community value are not currently in force in Wales. Therefore, the following will only be applicable in England until such time as the provisions take effect in Wales.

2.153 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 in England 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. The Act allows for some different guidance to be issued by Welsh Ministers and regard should therefore be had to any such guidance (made under section 104).

2.154 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.

2.155 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.

2.156 NHS organisations 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.

2.157 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 6-week period in which to decide whether to submit a bid to purchase and run the ACV.

- If the community group decides 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. However, it may be argued that ACV listing artificially drives down the value or puts off prospective purchasers due to the delay.

- 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

2.158 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

2.159 Tenancy and other agreements should be properly managed (whether the NHS organisation is acting as landlord or tenant) and all NHS organisations must obtain advice from Specialist Estates Services for all aspects of lease and licence management.

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

- minor user rights;

- donated assets;

- use of non-NHS premises for treatment of NHS patients.

Management of land and property

2.161 These are discussed below. Other contractual obligations will arise from PFI projects.

Minor user rights

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

2.163 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.

2.164 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.

2.165 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.

Management of land and property

Donated property and charity issues

2.166 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.

2.167 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.

2.168 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.

2.169 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

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

2.171 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 Care and Social Services Inspectorate Wales (CSSIW).

2.172 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.

2.173 NHS organisations should have the ability to make random periodic checks to ensure that these provisions are being adhered to.

Joint schemes with local authorities

2.174 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.

2.175 It is becoming increasingly common for 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 33 of the *National Health Service (Wales) Act 2006* are a good example.

2.176 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").

2.177 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.

2.178 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).

2.179 Additional considerations apply if the premises are leased by the owning partner because any such sharing arrangement will need to comply with the terms of the owning partner's lease.

2.180 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.

Management of land and property

2.181 Where joint funding of a capital project is required, the use of powers under sections 33 and 34 of the *National Health Service (Wales) Act 2006*, 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

2.182 The Welsh Ministers have a duty under section 38 of the *National Health Service (Wales) Act 2006* to make available to local authorities (a) services or other facilities provided by the Welsh Ministers under the 2006 Act (b) services provided as part of the health service by any person employed by the NHS organisation, so far as is reasonably necessary to enable local authorities to discharge their social services, education and public health functions.

2.183 A formal lease, on terms recommended by Specialist Estates Services, is generally appropriate for the use of land and property under such circumstances.

2.184 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 to accommodate those staff, the NHS organisation will be required to meet the cost of that accommodation.

Management of the historic estate

2.185 *Planning Policy Wales* (PPW) states "The historic environment of Wales is made up of individual historic features, archaeological sites, historic buildings and historic parks, gardens townscapes and landscapes collectively known as historic assets" (Welsh Government 2016).

2.186 It goes on to state that "The most important of these historic assets have statutory protection through scheduling, listing or designation as a conservation area. Other assets are included in formal registers, which identify them as being of special historic interest. Many others make a positive contribution to local character and sense of place. Some, such as buried archaeological remains, have still to be identified. It is important to protect what is significant about these assets and sustain their distinctiveness. Historic assets should be the subject of recording and investigation when they are affected by proposals that alter or destroy them."

2.187 The NHS estate may include various types of these historic assets (see **paragraph 3.79**).

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

2.189 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.

Management of land and property

Legislation and guidance relating to the historic estate

2.190 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, the Planning (Wales) Act 2015, the Historic Environment (Wales) Act 2016* and the *Ancient Monuments and Archaeological Areas Act 1979.*

2.191 PPW (Welsh Government 2016) provides guidance on the historic environment in relation to the planning system (see **paragraphs 2.184 - 2.188** and **3.15 – 3.16**).

2.192 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 PPW (and future Technical Advice Note 24: The Historic Environment) and the Local Development Plan.

2.193 Welsh Office Circular 61/96 *Planning and the historic environment: listed buildings and conservation areas* provides guidance on the historic environment in relation to the planning system. Welsh Office Circular 60/96 *Planning and the historic environment: archaeology* provides guidance on archaeology in the planning system.

2.194 The 1997 version of *Estatecode, Historic buildings and the health service in Wales* (Welsh Office publication 1997) contains more detailed guidance on historic estate matters.

The care and management of the historic estate

2.195 Advice on the conservation and management of the historic environment in Wales is set out in circular guidance listed below and available from Cadw, the Welsh Government's historic environment division, at Plas Carew, Parc Nantgarw, Cardiff CF15 7QQ. (phone: 01443 336000). Alternatively, it can be viewed online at the Cadw website (see the "References" section at the end of this document for links).

- Welsh Office Circular 60/96 *Planning and the historic environment: archaeology*
- Welsh Office Circular 61/96 *Planning and the historic environment: listed buildings and conservation areas*
- Welsh Office Circular 1/98: *Planning and the historic environment: directions by the Secretary of State for Wales.*

2.196 NHS organisations may refer to Cadw for general advice on issues relating to ancient monuments and parks and gardens, not otherwise covered in published guidance. The relevant local authority should be consulted in all cases relating to proposed works to listed buildings and to structures situated within conservation areas.

Management of land and property

The management of burial grounds and war memorials

Burial grounds

2.197 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.

2.198 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.

2.199 See **paragraphs 4.197 – 4.199** for guidance on the disposal of burial grounds.

War memorials

2.200 War memorials feature within the estates of many NHS organisations, 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 4.200 – 4.203** for guidance on the relocation and disposal of war memorials.

2.201 NHS organisations should follow *War memorials in England and Wales: guidance for custodians* (Department for Constitutional Affairs 2007). 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.

2.202 NHS organisations 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).

2.203 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 from Cadw. 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*.

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

2.205 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.

2.206 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.

2.207 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.

2.208 National grant schemes for war memorials are administered by the War Memorials Trust. Cadw is able to offer grants for the repair and conservation of war memorials in Wales. Cadw also operates a small grants scheme – the Civic Initiatives (Heritage) Grant Scheme, which gives grants for projects which promote and enhance the appreciation of the built environment: memorials may also be assisted under this scheme. For further information and guidance visit the Cadw website: **http://cadw.gov.wales/historicenvironment/help-advice-and-grants/grants/grantsforwarmemorials/?lang=en**

2.209 NHS organisations 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 Cadw with the War Memorials Trust.

Contact details:

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

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

Chapter 3

Town planning and the NHS

Introduction

3.1 This chapter provides an overview of the town and country planning system in Wales at national, regional and local levels, and explains its implications for NHS organisations in terms of:

- strategic planning for healthcare;
- the provision of estate healthcare facilities; and
- the disposal of surplus NHS estate.

3.2 The chapter explains why and how NHS organisations should engage with the Welsh Government and local planning authorities (LPAs) in the formulation of planning policy. With a view to influencing its content, and how to navigate the statutory procedures and the policy and technical requirements involved in preparing and submitting planning applications with a view to achieving a positive outcome from the development management (formerly development control) system.

3.3 Planning is a complex process: the requirements for making planning applications have become more detailed and more onerous in recent years. The planning system in Wales is increasingly different from that in England, with its own statutes, policies and procedural requirements. Significant changes to the Welsh planning system were introduced in 2015-16 and the divergence from England is likely to continue in the future. The legislation applicable in Wales is now widely dispersed and, in some cases, is not readily accessible. The Law Commission (2017) takes the view that: *'Planning law in Wales is unnecessarily complicated and, in places, difficult to understand'*. It has recently established a panel to consider codifying planning law as it applies in Wales but the results of its efforts are likely to be some years off.

3.4 It is likely that in all but the simplest matters, NHS organisations will require specialist advice in this field. Planning advice should generally be sought from qualified planning consultants: care should be taken to ensure that the planning consultant is appropriately qualified and, in particular, is a Chartered Town Planner: a Member (or Fellow) of the Royal Town Planning Institute (RTPI).

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

- the Wales planning policy framework, statutory national and strategic development plans and, where appropriate, regional and sub-regional strategies;
- the development plan system, under which each LPA is required to produce a statutory local development plan (LDP) for its area;

- the development management system, which determines whether planning permission is required and, if so, how it may be obtained and the requirements of the system complied with;
- the enforcement of planning control in respect of unauthorised development;
- special interests, which includes the safeguards and procedures for protecting the historic environment and historic assets (such as listed buildings, conservation areas, parks and garden and scheduled monuments), certain trees and woodlands (tree preservation orders) and hedgerows, public rights-of-way, etc;
- the place of the Welsh language in the planning process.

Legislation

Primary planning legislation

3.6 As a statutory function, town and country planning is governed by a range of legislation. Much of it is common to both Wales and England, but there are important differences: for example, the *Planning (Wales) Act 2015* is the first Wales-only planning act and Part 6 of the *Planning and Compulsory Purchase Act 2004* applies only in Wales.

3.7 Primary planning legislation in force in Wales includes the following statutes (and their subsequent amendments):

- *Town and Country Planning Act 1990*
- *Planning (Listed Buildings and Conservation Areas) Act 1990*
- *Planning (Hazardous Substances) Act 1990*
- *Planning and Compensation Act 1991*
- *Planning and Compulsory Purchase Act 2004*
- *Planning and Energy Act 2008*
- *Planning (Wales) Act 2015.*

3.8 European directives also apply: for example, in relation to environmental impact assessment and protected species.

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3.9 The basic statute remains the *Town and Country Planning Act 1990*, which when first introduced set out planning law in England and Wales in a comprehensive way. The 1990 Act was significantly amended by the *Planning and Compulsory Purchase Act 2004; the Planning (Wales) Act 2015* further amends, in a substantive way, both the 1990 and 2004 Acts as they apply in Wales.

3.10 The *Planning and Compulsory Purchase Act 2004* was enacted with a view to:

- introducing a different development plan system;
- increasing the effectiveness and quality of community involvement in plan making;
- improving the development management process;
- removing the Crown's immunity from planning procedures; and
- reforming the rules regarding compulsory purchase and compensation.

3.11 Part 6 of the Act applies solely in Wales. It requires: (a) the preparation by the National Assembly for Wales of a Wales Spatial Plan (WSP), which must be kept under review; and (b) the preparation by LPAs of local development plans (LDPs). The Act requires that, in preparing the Wales Spatial Plan and LDPs, the plan-making bodies must contribute to the achievement of sustainable development. The requirement to prepare the WSP is now superseded by the National Development Framework (see below).

3.12 The *Planning Act 2008* focused on three distinct areas: the introduction of a new consenting regime for large infrastructure projects; changes to the existing planning regime in England and Wales; and the introduction of a new Community Infrastructure Levy (see below).

3.13 More recently, the 1990 Act has also been amended by the *Planning (Wales) Act 2015*. This act introduces significant changes in the preparation of statutory development plans at national, regional and local levels; makes provision for certain planning and other applications to be made to the Welsh Ministers; makes fundamental changes to the development management process and to other matters such as enforcement, town and village greens, the Welsh language, etc. Many of the more important changes are outlined later in this chapter.

Secondary planning legislation

3.14 Secondary or subordinate planning legislation applicable in Wales includes the following (and their subsequent amendments):

- *The Town and Country Planning (Use Classes) Order 1987 (UCO)*
- *The Town and Country Planning (General Permitted Development) Order 1995 (GPDO)*

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- *The Town and Country Planning (Local Development Plan) (Wales) Regulations 2005*
- *Community Infrastructure Regulations 2010*
- *The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPWO)*
- *The Town and Country Planning (Non-Material Changes and Correction of Errors) (Wales) Order 2014*
- *The Town and Country Planning (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015*
- *The Town and Country Planning (Pre-Application Services) (Wales) Regulations 2016*
- *The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017.*

Other relevant legislation

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

- biodiversity;
- historic environment;
- highways, transportation and other infrastructure issues;
- compulsory purchase;
- sustainable development; and
- administrative law.

3.16 Of particular relevance are the following recently-enacted statutes that apply only in Wales:

- *Active Travel (Wales) Act 2013*, which requires the Welsh Ministers and local authorities to take reasonable steps to enhance the provision made for, and to have regard to the needs of, walkers and cyclists; to promote active travel journeys and secure new and improved travel routes and related facilities; and to produce approved maps of active travel routes.

- *Well-being of Future Generations (Wales) Act 2015*, which requires public bodies (including Health Boards and NHS Trusts) '*...to do things in pursuit of the economic, social, environmental and cultural well-being of Wales in a way that accords with the sustainable development principle.*' The Act defines what is meant by the "sustainable development principle" and by "sustainable development", sets out the well-being goals of the National Assembly for Wales – including "A healthier Wales" – and requires the Welsh Ministers to set well-being objectives. It requires public bodies to set their own well-being objectives, to take steps to meet those objectives and to report on their action. A Commissioner for Future Generations has been appointed to advise and assist public bodies to comply with the Act.

- *Historic Environment (Wales) Act 2016*, which amends the law relating to ancient monuments and listed buildings of special architectural or historic interest; establishes a statutory register of historic parks and gardens and a list of historic place names; establishes historic environmental records for local authority areas; and establishes an Advisory Panel for the Welsh Historic Environment. Some provisions came into force in 2016; others are scheduled for 2017/18.

- *Environment (Wales) Act 2016*, which among other things promotes the sustainable management of natural resources and provides targets for reducing the emission of greenhouse gases.

Welsh Government planning policy

Introduction

3.17 Welsh Government planning policy is set out in a series of documents, namely:

- *People, Places, Futures: The Wales Spatial Plan Update 2008 (WSP)*

- *Planning Policy Wales (PPW)*

- the series of Technical Advice Notes (TANs)

- Government circulars, letters and manuals issued by the Welsh Government, including former Welsh Office Circulars some of which remain extant.

These documents, which are updated periodically, can be viewed at **http://gov.wales/topics/planning/policy/?skip=1&lang=en**

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Wales spatial plan

3.18 The *Wales Spatial Plan*, first issued in 2003 and updated in 2008, is a statutory plan prepared under section 60 of the 2004 Act. The WSP sets out a strategic framework to guide future development and policy interventions over a twenty-year horizon. It gives a national spatial perspective and sets out area perspectives for eight sub-regions (Spatial Planning Areas) in Wales. By law, the WSP must be taken into account in the preparation of LDPs. Increasing health expectations are identified in the WSP as one of the factors driving change in Wales and access to health and care services and reducing health inequalities are identified as areas where change is required.

Planning Policy Wales

3.19 *Planning Policy Wales (PPW)* sets out the land use planning policies of the Welsh Government and is updated from time to time: the current version is Edition 9, published in November 2016. PPW is arranged on a topic basis with separate chapters on matters such as housing, economic development, transport, historic environment, etc. PPW also gives guidance on plan preparation and planning for sustainability. Edition 10 is currently (April 2018) at consultation and is a substantial rewrite with planning policy focussed on "placemaking".

3.20 Sustainable development is a theme running throughout PPW and, as noted above, it is the statutory duty of all public bodies in Wales to carry out sustainable development. "Sustainable development" is defined in PPW as '*…the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the well-being goals.*' (See **paragraph 1.17**). The goals are:

- a prosperous Wales
- a resilient Wales
- a healthier Wales
- a more equal Wales
- a Wales of cohesive communities
- a Wales of vibrant culture and thriving Welsh language
- a globally responsive Wales.

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3.21 PPW states that previously developed (or "brownfield") land should whenever possible be used in preference to greenfield sites, particularly those of high agricultural or ecological value. PPW contains (at Figure 4.4) the official definition of "previously developed land":
'Previously developed land is that which is or was occupied by a permanent structure (excluding agricultural or forestry buildings) and associated fixed surface infrastructure. The curtilage of the development is included, as are defence buildings, and land used for mineral extraction and waste disposal where provision for restoration has not been made through development management procedures.'

A footnote to Figure 4.4, relating to the definition of curtilage, is of particular relevance to the redevelopment of hospital sites:
'*… All of the land within the curtilage of the site will also be defined as previously-developed. However, this does not mean that the whole area of the curtilage should therefore be redeveloped. For example, where the footprint of a building only occupies a proportion of a site of which the remainder is open land (such as a hospital) the whole site should not normally be developed to the boundary of the curtilage…'*

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Technical advice notes

3.22 PPW is supplemented by a wide range of Technical Advice Notes (TANs), which contain advice that is a material consideration in the determination of planning applications and appeals. The current (April 2018) list of TANs is as follows:

TAN	Title	Date
1.	*Joint Housing Land Availability Studies*	2015
2.	*Planning and Affordable Housing*	2006
3.	*Simplified Planning Zones*	1996
4.	*Retail and Commercial Development*	2016
5.	*Nature Conservation and Planning*	2009
6.	*Planning for Sustainable Rural Communities*	2010
7	*Outdoor Advertisement Control*	1996
8.	*Renewable Energy*	2005
9.	Withdrawn *(Enforcement of Planning Control, 1997)*	
10.	*Tree Preservation Orders*	1997
11.	*Noise*	1997
12.	*Design*	2016
13.	*Tourism*	1997
14.	*Coastal Planning*	1998
15.	*Development and Flood Risk*	2004
16.	*Sport, Recreation and Open Space*	2009
17.	Withdrawn *(Environmental Impact Assessment,1999)*	
18.	*Transport*	2007
19.	*Telecommunications*	2002
20.	*Planning and the Welsh Language*	2017
21.	*Waste and* TAN 21 *Waste Planning Practice Guidance*	2014
22.	Withdrawn *(Planning for Sustainable Buildings, 2010)*	
23.	*Economic Development*	2014
24.	*The Historic Environment*	2017

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3.23 It should be noted that TAN 22 *Planning for Sustainable Buildings* – which set planning standards in respect of BREEAM (for non-residential buildings) and the Code for Sustainable Homes – was withdrawn in 2014, when the changes to Part L (energy efficiency) of the Building Regulations came into force.

3.24 NHS organisations are unlikely to be involved in development that entails minerals but, in that event, there is a separate series of Minerals Planning Policy Guidance (MPPG) and Minerals Technical Advice Notes (MTAN).

Circulars/Policy clarification letters/Dear CPO letters, Manuals

3.25 On a fairly regular basis the Chief Planner at the Welsh Government issues Circulars, Policy Clarification Letters and Dear Chief Planning Officer Letters. These provide advice on a wide range of topics and on recent changes to planning law and practice.

3.26 Some Circulars issued many years ago by the former Welsh Office (WO) remain extant. The following Circulars may be particularly relevant to NHS bodies:

- WO Circular 22/83 *Purchase Notices*
- WO Circular 5/93 *Public Rights of Way*
- WO Circular 13/97 *Planning Obligations*
- WG Circular 016/2014 *The Use of Planning Conditions for Development Management*.

3.27 The Welsh Government has published two important manuals:

- *Local Development Plan Manual* (Edition 2), August 2015, which is an online reference document for practitioners implementing or contributing to LDP preparation and provides practical and technical advice on how to prepare or revise a LDP.
- *Development Management Manual,* updated periodically, which is an online comprehensive guide to the development management system.

NHS involvement

3.28 NHS organisations should ensure that their interests are reflected in the preparation of Welsh Government planning policy. Increasing the awareness of the healthcare agenda at a national level will assist in producing positive healthcare plans at a local level. All the main policy documents produced by the Welsh Government – such as PPW and the TANs – are widely consulted on and realistic periods are allowed for consultees' responses.

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National and regional planning

National development framework for Wales

3.29 The 2015 Act requires the Welsh Ministers to prepare a plan, to be known as the *National Development Framework for Wales* (NDF), which must set out their policies for the cohesive strategic development and use of land in Wales and they must keep it under review. The NDF must be subject to public participation and an appraisal of the sustainability of the policies it contains, including an assessment of the effects of the policies on the use of the Welsh language. The NDF will replace the WSP referred to above.

Strategic development plans

3.30 The 2015 Act gives the Welsh Ministers the power to designate an area of Wales as a strategic planning area (SPA) and to establish a strategic planning panel for the area. The panel must:

- keep under review matters affecting the development of the SPA and the planning of that development;
- prepare a strategic development plan (SDP) for that area, which must be in general conformity with the NDF, and have regard to current national policies, any SDP for an adjoining area, the LDPs for the area, etc; and
- carry out a sustainability appraisal of the plan, including an assessment of the likely effects of the plan on the use of the Welsh language in the SPA.

3.31 The NDF and SDP will be important documents in that: first, LDPs must be prepared in conformity with them; and second, they form part of the development plan for the area. The latter has a particular significance for the approach to be adopted to the determination of planning applications and appeals as set out in section 38(6) of the 2004 Act (see **paragraph 3.33** for further information).

NHS involvement

3.32 NHS organisations should ensure that their interests are reflected in the preparation and adoption of the NDF and SDP. Both plans will be subject to public participation.

Local planning

Local development plans

3.33 Statutory development plans are important documents. Section 38(6) of the 2004 Act requires that the determination of planning applications and appeals '*...must be made in accordance with the plan unless material considerations indicate otherwise.*' Hence, development plans are usually the first point of reference for the decision-maker when considering the merits of a planning application or appeal.

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3.34 Each LPA in Wales must prepare and maintain a Local Development Plan (LDP). When adopted, an LDP will replace existing development plans in that area, such as the old-style local plans and the Unitary Development Plans (UDP). The majority of LDPs are now in place and some are already in the process of being reviewed, but in some areas they have still not yet been adopted. Each LPA must obtain the Welsh Government's approval of a delivery agreement for its LDP, which includes the timescale for preparing the LDP. Progress in preparing LDPs, together with the stages at which representations may be made, is easily ascertained by consulting the LPAs' websites. NHS organisations can find out from its LPA the stage it has reached in the preparation of the LDP and how to become involved. The process of preparing a LDP is extended; overall it takes several years from commencement to adoption.

3.35 In preparing its LDP each LPA is expected to take account of national planning policy guidance and must, by law, take account of the WSP and, when they exist, the NDF and any SDP.

3.36 In preparing its LDP, a LPA will at an early stage invite the submission of so-called candidate sites. This is an opportunity for NHS organisations to promote sites for development and surplus property for alternative uses and redevelopment. All submitted candidate sites are subject to sustainability assessment by the LPA in preparing its strategy for the area and in allocating land for future development.

3.37 NHS organisations should monitor the preparation of LDPs in their areas. It is particularly important: (a) that candidate site submissions are made in a timely fashion; and (b) that representations are made at the deposit stage (which lasts at least six weeks) and before the deadline set by the LPA: late representations will not be entertained. After the deposit stage, opportunities for further LDP consultation are more limited and are confined to changes proposed by the LPA. Following deposit, the LDP and any objections to it will be independently considered by an inspector from The Planning Inspectorate. To assist this process an examination of the LDP is held at which invited objectors and other participants can debate the merits of particular policies and site allocations. The inspector's recommendations at the conclusion of the examination are binding on the LPA.

Supplementary planning guidance

3.38 LPAs also prepare supplementary planning guidance (SPG) on a range of topics such as affordable housing, planning obligations, design criteria, etc. SPG may include development briefs for particular areas or large development sites, where the opportunity exists to stipulate the range of community (including healthcare) facilities necessary to support major developments to ensure that they are sustainable. SPG should comply with the LDP and should not be used to avoid subjecting policies and proposals to independent examination and public scrutiny. PPW advises that substantial weight may be given to approved SPG when it is consistent with the development plan and has been the subject of consultation.

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NHS involvement

3.39 LDPs are subject to ongoing consultation. NHS organisations will have opportunities to promote sites and to comment on other land use allocations and on LDP policies. Because of the importance attached to development plans, it is vital that full advantage is taken of these opportunities. NHS organisations, individually and collectively, should therefore ensure that their healthcare and property interests are properly reflected and protected at all stages in the preparation, adoption and review of LDPs.

3.40 If LDPs do not reflect NHS requirements, it may be more difficult to obtain planning permission for the development of new or existing premises to meet future healthcare needs or to obtain planning permission for alternative uses/redevelopment prior to the disposal of surplus estate.

3.41 NHS organisations need to influence the development of local policy on planning conditions and, particularly, planning obligations in order to secure contributions towards the cost of healthcare facilities. (This could include designated land, buildings or financial contributions.) For example, this could relate to a planning condition on the permission for a new housing development to provide a site for a local primary care centre or a contribution under a section 106 agreement where a development or series of developments will create additional healthcare needs as a result of population increase in an area. Similarly, NHS organisations should make representations on site and area development briefs to ensure proper provision for healthcare facilities to serve new or expanded populations.

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

Development management

The requirement for planning permission

3.43 Planning permission is required for "development", which is defined as '*...the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change of use in the use of any buildings or land*' (section 55(1) of the 1990 Act). "Building operations" are defined to include demolition, rebuilding, structural alterations or additions to buildings and other operations normally carried out by a builder. "Engineering operations" include the formation or laying out of an access to a highway.

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Exceptions

3.44 Certain operations or uses do not constitute "development"; they include:

- the maintenance, improvement or alteration of a building which affects only the interior of the building or does not materially affect its external appearance; and
- changes of use where both the old and new uses fall within the same use class as set out in the *Town and Country Planning (Use Classes) Order 1987* as amended (UCO).

3.45 NHS bodies will be familiar with uses permitted within their estate under the UCO. The classes of particular relevance to NHS bodies are:

- Class C2 – residential institutions including hospitals and nursing homes;
- Class C2A – secure residential institutions, including secure hospitals; and
- Class D1 – non-residential institutions including use for the provision of any medical or health services (except where they are attached to the residence of the consultant or practitioner).

3.46 A change of use to another use within the same use class does not constitute development (section 55(2)(f) of the 1990 Act). For example:

- Class C2 – may alternatively be used as a residential school, college or training centre.
- Class C2A – may alternatively be used as a prison, young offenders institution, detention centre, etc.
- Class D1 – may alternatively be used as a crèche, day centre, museum, art gallery, public library, public hall or for public worship, etc.

3.47 If there is doubt as to whether a proposed development or change of use requires planning permission, a formal determination may be obtained from the LPA by applying for a certificate of lawfulness of proposed use or development (CLOPUD). This is the only way of obtaining a legally binding determination as views expressed by planning officers (even if given in writing) are not binding on the authority. Application may also be made for a certificate of lawfulness of existing use or development (CLEUD) which, if granted, precludes enforcement action being taken against that use or development.

3.48 Some development that requires planning permission is granted permission automatically under the permitted development rights contained in the *Town and Country Planning (General Permitted Development) Order 1995* as amended (GPDO). Schedule 2 of the GPDO sets out a list of types of development for which the order effectively grants planning permission without having to apply to the LPA. For NHS organisations, the following permitted development rights are likely to be particularly relevant:

- Part 31 grants permission for demolition, subject to the requirement that an application is first made to the LPA to determine whether its prior approval will be required for the method of demolition and any proposed restoration of the site. It should be noted that Part 31 permitted development rights do not apply to demolition that, because of the likelihood of significant environmental effects, is screened as "EIA development".

- Part 32 grants limited rights, under Part A, for the erection, extension or alteration of a hospital building. These are subject to restrictions on size (maximum 100 square metres), position relative to a curtilage boundary (up to 5 metres), height (up to 5 metres), etc. The permitted development rights are subject to conditions and do not extend to listed buildings or if the development would lead to a reduction in the space available for vehicle parking or turning. Part B rights allow the erection of a refuse or cycle store again subject to restrictions and conditions.

- Part 33 grants rights for the installation, alteration or replacement on a building (except a listed building or scheduled monument) of a closed circuit television camera. These are subject to dimensional and other restrictions and to conditions. For this purpose, "building" includes any structure or erection but excludes a gate, fence, wall or other means of enclosure.

Categorisation of development

3.49 Development that requires an express grant of planning permission (as distinct from development that is permitted by the GPDO) is subject to the development management system (previously known as development control). This entails making an application to the LPA or, in certain cases, to the Welsh Ministers. For the purposes of the development management system, the *Development Management Procedure (Wales) Order 2012* (DMPWO) distinguishes between "major development" and other development, the former being defined as development involving any one or more of the following:

- the winning and working of minerals or the use of land for mineral-working deposits;

- waste development;

- the provision of dwellinghouses where:

  - the number to be provided is ten or more; or

  - the development is to be carried out on a site of 0.5 hectare or more and it is not known whether the development will involve ten or more dwellinghouses;

- the provision of a building(s) where the floor space to be created is 1000 square metres or more; or

- development carried out on a site of 1 hectare of more.

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3.50 Where the application is for major development, different circumstances apply in respect of, for example, the requirement for design and access statements and statutory pre-application consultation, and the fees chargeable for pre-application advice.

Pre-application advice

3.51 An NHS organisation contemplating making an application for planning permission is well advised to consult the LPA in advance. Ad hoc pre-application consultation with LPAs has been a regular feature of the planning system for many years, but the 2015 Act requires all LPAs to provide a statutory pre-application service. Enquiries have to be submitted on a pre-application advice enquiry form and there is a fee payable to the LPA (not subject to VAT). The fee is the same throughout Wales, but varies according to the size of the development; currently, an enquiry for a "minor development" attracts a fee of £250; "major development" a fee of £600; and "large major development" a fee of £1000. The period for a written response from the LPA is 21 days unless an extension of time is agreed between the applicant and the LPA. Subsequent meetings with the LPA attract an additional fee (which is subject to VAT).

3.52 The LPA's written response should provide the applicant with:

- the relevant planning history for the site;
- the relevant development plan policies against which the development proposal will be assessed;
- relevant supplementary planning guidance;
- any other material considerations;
- an initial assessment of the proposed development based on the above information; and
- a statement of whether any planning obligations or Community Infrastructure Levy contributions will be sought and, if so, their scope and amount.

Pre-application consultation

3.53 Section 17 of the *Planning (Wales) Act 2015* has introduced an entirely new system of pre-application consultation which applies to all applications for "major development", whether full or outline, and applications for developments of national significance (see below). The requirement does not apply to applications for the approval of reserved matters, non-material amendments and minor material amendments, or to applications under sections 73 and 73A of the 1990 Act.

3.54 Before submitting a planning application the applicant is required to undertake the following publicity/consultation procedures:

- display a site notice on or near the site for at least 28 days;
- write to any owner or occupier of any land adjoining the application site;

- make the draft planning application and all supporting documents (including the environmental statement if the proposed development is "EIA development") available for at least 28 days for the public to read;

- consult the stipulated consultees, namely:

  - community consultees: each community council in whose area the application site is located and each councillor representing an electoral ward in which the application site is located;

  - specialist consultees: as defined in schedule 4 of the DMPWO, such as (but not limited to) Natural Resources Wales, The Coal Authority, the Health and Safety Executive, etc.

- submit a pre-application consultation report as part of the planning application, which must contain:

  - a copy of the site notice;

  - a declaration that the site notice was maintained in position for at least 28 days;

  - a copy of the notice given to owners and occupiers of adjoining land;

  - a copy of each notice provided to the consultees;

  - a summary of the issues raised and confirmation that they have been addressed and, if so, how they have been addressed;

  - a copy of each response received from the specialist consultees and an explanation of how each response has been addressed by the applicant.

3.55 The pre-application consultation requirement is additional to any other consultation or public engagement that may have been undertaken. It has the effect of lengthening the pre-application process by at least 28 days together with the time taken to initiate the consultation and to consider and document the responses made to any issues raised. Depending on the scale and nature of the development and the volume of responses received, this additional period could be considerable. Pre-application consultation by the applicant does not absolve the LPA of its duty to consult once the planning application has been submitted. It remains to be seen whether pre-application consultation will have the effect of shortening the determination period for applications.

3 Town planning and the NHS

Planning applications

Developments of national significance

3.56 The 2015 Act makes provision for planning applications for "developments of national significance" (DNS) to be made to and determined by the Welsh Ministers instead of the LPA. In practice, The Planning Inspectorate handles these applications on behalf of the Welsh Ministers. This power does not extend to applications for outline planning permission but does allow for secondary consents (such as listed building consent and the diversion or stopping-up of a footpath) to be determined at the same time. The Welsh Government has issued regulations that specify the thresholds and criteria for types of development which qualify as DNS. Currently, these include major developments such as large generating stations, airports, dams, reservoirs, etc and are unlikely to impinge on NHS organisations.

Types of application for planning permission

3.57 There are three main types of application for planning permission: outline, full and hybrid.

Outline planning application

3.58 The purpose of an outline planning application is to establish the principle of built development, reserving the detail for approval at a later stage. Notwithstanding this, LPAs usually require considerable supporting information and are entitled to stipulate that further details should be provided. The time when an applicant could submit a simple outline planning application, supported by just a red line plan, has long since passed. Especially in the case of large development sites, master plans or illustrative development frameworks are now invariably required. Outline applications must also satisfy certain regulatory requirements: see article 3 of the DMPWO.

3.59 On outline planning applications certain matters are reserved for subsequent approval by the LPA, the details of which will need to be approved by the LPA before the development can commence. Applications to discharge the so-called reserved matters – defined as access, appearance, landscaping, layout and scale – have to be submitted for the approval of the LPA within three years (or such other period as the LPA may stipulate), otherwise the outline permission will lapse. It is important that planning permissions are protected: see **paragraph 3.62.**

Full planning application

3.60 Where the application is for full planning permission, full details of the development have to be submitted including, when necessary, detailed design drawings. Some matters – for example, landscaping – may sometimes be dealt with by conditions attached to the full planning permission but, increasingly, LPAs are requiring planning applications to be fully supported.

Hybrid planning application

3.61 A hybrid application is a combination of an outline and full planning application. It is particularly useful where, for example, a phased development is to be carried out, establishing the principle of the overall development and obtaining detailed planning permission for the first phase.

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Applications under sections 73 and 73A

3.62 Two other types of application are worthy of mention:

- An application under section 73 of the 1990 Act may be used to delete or vary one or more conditions subject to which a planning permission has been granted. This can include an application to vary the condition on an outline planning permission that stipulates the time period within which applications must be submitted to have the reserved matters approved. This is a useful and relatively inexpensive way of extending the life of an extant permission. A section 73 application may also be used, for either outline or full planning permissions, to vary the period within which the development may be commenced. The outcome of a section 73 application, if granted, is a new planning permission,

- An application under section 73A of the 1990 Act may be used to grant planning permission with retrospective effect: for example, for development carried out without planning permission or work already undertaken without complying with a condition subject to which permission was granted.

3.63 Planning applications are made on a standard application form. Nowadays, the simplest way of submitting a planning application is on-line, via the Planning Portal, which may also be used for making a planning appeal: **https://www.planningportal.co.uk**

Planning application fees

3.64 Most planning applications require the payment of a fee to the LPA. There is a national scale of fees, increased from time to time, available on the LPA's website and the Planning Portal. The fees are not subject to VAT.

Supporting documentation

3.65 Most applications for planning permission – whether in outline or full – have to be accompanied by supporting documentation. Sometimes these are a statutory requirement – the design and access statement and an environmental statement; others are a policy requirement – for example, TAN 15 flood risk assessments; others are required according to answers given to questions on the planning application form – for example, ecology surveys and arboricultural assessments; others are local requirements, stipulated by the LPA. Many LPAs now have local validation checklists and it is advisable to consult the LPA to ensure that their application requirements are clarified before submission. The following is not an exhaustive list but covers the types of documents most likely to be required on NHS sites.

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Design and access statements

3.66 The DMPWO defines those categories of development where design and access statements are required: (a) major development; and (b) any development in a designated area (conservation area or a World Heritage Site) which consists of one or more dwelling houses or a building(s) where the floor space created is 100 square metres or more. Applications for, among others, a material change in use of a building or land or an application under section 73 of the 1990 Act do not require to be accompanied by a design and access statement. From 1 September 2017, design and access statements are no longer required in respect of applications for listed building consent; they are replaced by heritage impact statements.

3.67 The DMPWO sets out the required scope of a design and access statement:

- to explain the design principles and design concepts that have been applied to the development;
- to demonstrate the steps taken to appraise the context of the development and how the design of the development takes that context into account;
- to explain the policy or approach adopted as to access and how policies relating to access in the development plan have been taken into account; and
- to explain how specific issues which might affect access to the development have been addressed.

3.68 The Welsh Government promotes sustainable development and places considerable emphasis on the design quality of development projects. TAN 12 gives advice on the objectives of good design, the design process, delivering good design and the role of the Design Commission for Wales, to which planning applications may be referred for consideration at pre-application or post-application stage. Official guidance on the preparation of design and access statements is contained in *Design and Access Statements in Wales: Why, What and How* (Welsh Government, April 2017).

Environmental impact assessment

3.69 Environmental Impact Assessment (EIA) is a procedure that must be followed for certain types of project before they may be given planning permission or even, in certain cases, before reserved matters or other planning conditions may be approved. The procedure is a means of assessing the project's likely significant environmental effects, and the scope for reducing them, through mitigation or compensation. The output from an EIA is an Environmental Statement (ES), which is submitted to the LPA in support of the planning application. The requirements for EIA are set out in the *Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017.*

3.70 Because any requirement for EIA is likely to delay the preparation and submission of a planning application, early consideration should be given to whether a proposed development will require EIA. Where there is any doubt whether EIA is required for a particular development, the prospective applicant may apply to the LPA, under Regulation 6, for a "screening opinion", which is a definitive decision by the LPA (or, in certain cases, by the Welsh Ministers) of whether EIA is required. The regulations set out

the thresholds at which screening should be undertaken – all developments in defined "sensitive areas" (such as National Parks, Areas of Outstanding Natural Beauty and Sites of Special Scientific Interest) will require screening – and the selection criteria that must be taken into account. In the event of EIA being required, application may also be made, under Regulation 14, for a "scoping opinion", which will determine the extent of the EIA in any particular case.

3.71 The preparation of an EIA is a substantial piece of work, which will usually take several months to complete. Where the potential significant effects include those on ecology (both habitats and species), lengthy survey periods may be entailed, to ensure that relevant seasonal data is collected. This can have a significant bearing on the pre-submission timescale for planning applications.

3.72 Even where an EIA is not required, some applications will still need to be accompanied by an assessment of the effect of the development on any environmental interests, such as archaeology or ecology.

Transport assessments, transport statements and travel plans

3.73 Transport issues are becoming increasingly significant in determining planning applications. TAN 18 *Transport* advises that a Transport Assessment (TA) will be required to accompany planning applications for developments that are likely to result in significant trip generation. Annex D of TAN 18 identifies the thresholds for a variety of uses, including a hospital in excess of 2,500 square metres and a housing development of more than 100 dwellings. Specific advice on TAs for hospitals is provided in paragraph D6 of the TAN 18 annex.

3.74 TAN 18 advises that the TA process should also include the production of a Transport Implementation Strategy (TIS), which should set objectives and targets relating to managing travel demand for the development and set out the infrastructure, demand management measures and financial contributions necessary to achieve them. LPAs may also expect to see travel plans (sometimes known as green travel plans), especially for larger developments, including new or extended hospitals.

Flood consequences assessments

3.75 The Welsh Government has issued guidance on flood risk: TAN 15 Development and Flood Risk. The TAN is accompanied by a series of Development Advice Maps (now managed by Natural Resources Wales and available on line at **https://www.naturalresources.wales/evidence-and-data/maps/long-term-flood-risk/?lang=en)** that categorise the flood risk throughout Wales: from Zone A (little or no risk of flooding) to Zone C2 (floodplain areas without significant flood defence infrastructure). Depending upon the location of any site in relation to the flood risk categories, a planning application may need to be accompanied by a flood risk/consequences assessment, which should be prepared by consultants with particular expertise in this field.

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3.76 It is advisable to consult the Development Advice Maps at an early stage in the planning process as the flood risk designation can have a significant effect on both the acceptability of developing a site and the timescale for promoting it. National planning policy seeks to steer new development away from sites in Zone C and towards suitable land in Zone A, otherwise to Zone B, where river or coastal flooding will be less of an issue. In Zone C2, hospitals (which are classified in TAN 15 as "emergency services") and residential premises (classified as "highly vulnerable development") are not considered to be acceptable. Their location in Zone C1 has to be justified against the tests and criteria set out in TAN 15.

Ecology assessments

3.77 For ecology, an initial survey (known as an extended Phase 1 habitat survey) is often required, and may be followed by Phase 2 surveys, including surveys of protected species. The Phase 1 survey will identify habitats of nature conservation interest and a data trawl will identify sites of nature conservation importance, both statutory (such as Sites of Special Scientific Interest) and non-statutory (such as Sites of Interest for Nature Conservation), in the locality. The presence on a site of priority habitats and/or protected species (for example, bats, dormouse, great crested newts, badgers, etc.) can be very inhibitive of development prospects and will need to be fully researched before the planning permission is granted. Surveys for particular species have to be carried out at specific times of the year and failure to meet these seasonal requirements can result in substantial delay in submitting or processing a planning application. It is very important, therefore, that the seasonality of surveys is factored into the pre-application timescale.

3.78 Where protected species are present, or thought to be present, it is no longer permissible for such surveys to be deferred and dealt with by planning condition; they must be carried out and their results taken into account before the planning permission is granted. In certain cases, protected species can be translocated and a licence obtainable from Natural Resources Wales (on behalf of the Welsh Ministers) must be obtained beforehand.

Historic environment assessments

3.79 For the historic environment, policy advice is set out in Chapter 6 of PPW and TAN 24 *The Historic Environment*. For archaeological remains, the requirement may range from a desk-top study of the archaeological resource to a field excavation using geophysical surveying or trial trenching, with the results being reported to the LPA (and its own archaeological advisers) before the planning application is determined. Where archaeological remains are likely to exist, LPAs may require, by condition, that the site is fully excavated prior to development or that an archaeologist maintains a "watching brief" during earth moving and the excavation for the foundations. In all such cases, the NHS organisation will need to be advised by an archaeologist.

For other historic assets (scheduled monuments, listed buildings, conservation areas, historic parks, etc), information is likely to be required about the impact of the proposed development on both the asset and its setting (guidance on setting is provided in *Setting of Historic Assets in Wales*, Cadw, May 2017). In accordance with the new requirements in TAN 24, the assessment is to be provided in a heritage impact statement and guidance on the assessment process is contained in *Heritage Impact Assessment in Wales* (Cadw, May 2017).

Ground conditions and contamination

3.80 Where land within the application site is known or suspected to be contaminated, or where the use proposed may be susceptible to contamination (for example, houses with gardens), the planning application form requires a contamination assessment to be provided.

Arboricultural assessments

3.81 Where the proposed development may result in the felling of trees or hedgerows, the application form requires a tree survey and arboricultural assessment to be provided. These should be undertaken in accordance with the relevant British Standard, currently BS 5837 *Trees in Relation to Design, Demolition and Construction.*

Validation of planning applications

3.82 On submission, LPAs check planning applications to ensure that the correct fee has been paid and that other statutory requirements have been met. A similar procedure exists for applications to discharge conditions, etc. If a LPA considers that an application does not comply with a validation requirement, they must give notice to the applicant informing them that the application is invalid. An applicant in receipt of such a notice has two weeks in which to appeal to the Planning Inspectorate (acting on behalf of the Welsh Ministers). The Welsh Ministers have set a target of 21 days for The Planning Inspectorate to consider and determine such appeals.

Post-submission amendments

3.83 Following submission but prior to determination, applications may be amended, for example to accommodate comments made by the LPA or a consultee. Any amendment to an application for "major" development attracts a small additional fee payable to the LPA and gives the LPA an additional statutory period of four weeks in which to determine the application.

Determination of planning applications

3.84 Most applications for planning permission are determined by local planning authorities. The exceptions are:

- applications for developments of national significance, which are made direct to the Welsh Ministers (see **paragraph 3.56**);
- qualifying applications to a "designated authority" (a poorly-performing authority), where the applicant opts to have the application determined by the Welsh Ministers (see section 23 of the 2015 Act); and

- applications that are "called-in" for determination by the Welsh Minsters under section 77 of the 1990 Act. The Welsh Ministers may call-in any application for their own consideration, but have stipulated certain classes of development (called "notification development" in the *Town and Country Planning (Notification) (Wales) Direction 2012*) which, if the local planning authority does not propose to refuse the application, must be notified to the Welsh Ministers. These classes include any development in a flood risk area (Zone C2 on the TAN 15 Development Advice Map) and significant residential development (development of more than 150 dwellings or on a site of more than six hectares and which does not accord with the development plan for the area in which the site is located).

3.85 In determining a planning application, the decision-maker must have regard to all material planning considerations. These include the policies set out in adopted development plans and national planning policy guidance and may include policies in emerging development plans and other documents such as supplementary planning guidance. Section 38 of the 2004 Act requires that, where the development plan is material to a planning application, the determination of that application '*...must be made in accordance with the plan unless material considerations indicate otherwise.'* The same considerations apply on appeal.

3.86 In considering planning applications, LPAs are required by law to consult with certain bodies (the statutory consultees) and, generally, they consult with others as well. Statutory consultees have a duty to respond and have 21 days in which to provide a substantive response, unless they agree an extension in writing with the LPA. LPAs also consult those who live around the site and, by site notice and/or newspaper advertisement, with the general public. Whenever it is appropriate to do so, NHS organisations should be involved in the public consultation in order to influence decisions that impact on healthcare provision.

3.87 Certain applications may be referred by the LPA to the Design Commission for Wales or the Commission may request that it be consulted. It is also open to an applicant to consult the Commission in the formative stages of preparing its application and to seek the Commission's advice on the design aspects of the scheme. This is particularly appropriate where the project is large (for example a new hospital) or the site is prominently or sensitively located.

3.88 Once the application has been considered, it may be determined under powers delegated to planning officers. For other applications – especially for larger or more complex developments – the planning officer will make a recommendation to the planning committee of the council. The recommendation is contained in a written report to the committee which is available for public inspection three working days prior to the committee meeting. The planning committee is not bound to follow the planning officer's recommendation but must be prepared to demonstrate that it had good planning reasons for departing from it.

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3.89 Although the planning application may be deferred by committee – for example, to enable members of the committee to visit the site or to seek further information – the final decision will be one of the following:

- refuse permission;
- grant permission, subject to conditions;
- grant permission unconditionally (although all planning permissions will usually be subject to at least one standard condition as to the time period within which the development must be commenced before the permission lapses – see **paragraph 3.93**); or
- resolve to grant permission subject to the prior completion of a section 106 deed (either a bi-lateral agreement or a unilateral undertaking).

Where the LPA fails to determine a planning application within the determination period, there is a right of appeal to the Welsh Ministers (see below).

3.90 LPAs must ensure that decision notices issued after 16 March 2016 specify the plans and documents in accordance with which the development is to be carried out. From the same date, LPAs must update the decision notice and issue a revised version each time that a condition is discharged (including those relating to reserved matters) or removed or varied.

3.91 Planning permissions are usually granted subject to conditions. Conditions impose restrictions on the development and many conditions require the submission of further details for approval in writing by the LPA. Certain conditions (known as pre-commencement conditions or conditions precedent) require further details to be approved by the LPA prior to the commencement of development. It is very important that all conditions precedent are discharged prior to commencement of work as, otherwise, the permission may be regarded as invalid.

3.92 Both full and outline planning permissions are granted subject to a condition stating the period within which they should be implemented: this is usually five years but may be longer or shorter. Where the condition stipulating the period within which the development may be commenced is omitted from the decision notice itself (as it sometimes is), it is deemed to be imposed by virtue of sections 91 and 92 of the 1990 Act (as amended by the 2015 Act). For all outline planning permissions the reserved matters must be approved by the LPA before development may commence.

3.93 It is very important to implement a planning permission lawfully and within the stipulated period, otherwise it will lapse. Once lapsed, the LPA is not obliged to renew the permission, but it should have a good planning reason for not doing so, such as a change in planning policies or other material circumstances.

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Planning conditions and planning obligations

Planning conditions

3.94 Planning conditions can cover a wide range of matters. Official guidance on planning conditions is set out in Welsh Government Circular 016/2014 *The Use of Planning Conditions for Development Management*, which also contains an appendix of model conditions. The guidance sets out six tests for conditions, which are that conditions should be:

- necessary;
- relevant to planning;
- relevant to the development to be permitted;
- enforceable;
- precise; and
- reasonable in all other aspects.

3.95 Unduly onerous planning conditions/obligations may affect the sale price of surplus NHS property and the acquisition of property by NHS organisations.

3.96 NHS organisations should try to ensure that any conditions imposed on a planning permission are not unduly onerous and can be complied with. LPAs are not obliged to consult applicants on the planning conditions that they intend to impose on any particular permission. It is, however, helpful to ask the LPA for sight of the conditions in advance and, if possible, to be allowed to comment on them. The planning officer's committee report will usually contain a list of the conditions and the reasons for them. Even in the few days before committee, it is possible to suggest amendments to them. Much time and trouble can be saved by trying to ensure that the scope and wording of the conditions are appropriate to the development as LPAs cannot unilaterally amend defective or undesirable conditions.

3.97 Unacceptable conditions can be appealed or made the subject of an application to vary or delete them under section 73 of the 1990 Act.

3.98 Once a planning permission has been granted subject to conditions, it is possible to lodge an appeal against the conditions or to submit an application to vary or delete one or more of the conditions through a section 73 application.

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Planning obligations

3.99 Planning obligations under section 106 of the 1990 Act (commonly known as section 106 agreements but include unilateral undertakings) are a mechanism for making a development proposal acceptable in planning terms in respect of matters which cannot be controlled by condition and without which the development would not be acceptable. Legally enforceable against a person with an interest in the land, planning obligations may be used:

- to restrict development or use of land;
- to require operations or activities to be carried out;
- to require the land to be used in a specified way; and/or
- to require payments to be made to the authority either singly or periodically.

3.100 From 6 April 2010, regulation 122 of the *Community Infrastructure Regulations 2010* requires that, to be a material consideration in the determination or a planning application, any planning obligation must be:

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

3.101 From 6 April 2015, regulation 123 limits the "pooling" of section 106 financial contributions, allowing up to five planning obligations to be used towards a single project or a type of infrastructure. The restriction is backdated to 6 April 2010, meaning that existing permissions subject to obligations may have already contributed to such projects.

3.102 National policy guidance on *planning obligations* is set out in section 3.7 of PPW and, although somewhat dated now, in WO Circular 13/97 Planning Obligations. Welsh Government advice is that whenever there is a choice between using a planning condition or a planning obligation, a planning condition should be preferred.

3.103 Planning obligations are secured by a legal deed: either an agreement between the LPA and the landowner/developer; or the use of a unilateral undertaking. An undertaking is a deed entered into by the landowner/developer alone; it is often used on appeal, where agreement cannot be reached with the LPA regarding planning obligations. Generally, the use of an agreement is better than an undertaking as it enables obligations to be imposed on the LPA as well as on the landowner/ developer: for example, to return (with interest) financial contributions that are not used for their stipulated purpose within a specified period.

3.104 Where NHS organisations are seeking planning permission prior to selling surplus property, care should be taken not to agree to planning obligations that are unreasonable or unduly onerous, especially as they affect the land value. Professional (especially legal) advice should be sought before accepting any liability or entering into a section 106 planning obligation. In all cases, LPAs should be expected to demonstrate that planning obligations meet the three legal tests referred to in **paragraph 3.100.**

Minor or non-material amendments

3.105 In 2014 the Welsh Government introduced a formal procedure to approve non-material amendments to existing planning permissions and to correct errors. This entails making an application to the LPA on a standard form with the determination normally being dealt with under powers delegated to officers. A planning application fee is payable to the LPA.

Discharge of conditions

3.106 As noted above, planning permissions often contain conditions that must be discharged before the development is begun. It is important that any such conditions are properly discharged before development is commenced as failure to do so may invalidate the permission. Applications to discharge conditions are made formally, with a fee payable to the LPA,

Notification of commencement of development

3.107 A developer who has the benefit of planning permission for "major" development must notify the LPA of their intention to commence development and must prominently display a site notice at or near the place where the development is being carried out. These requirements are imposed by means of deemed conditions and failure to comply is therefore subject to enforcement action. Model forms for these purposes are set out in Appendix 5A and Appendix 5B of the DMPWO.

3.108 These requirements do not apply to planning permissions granted before 16 March 2016 (although some LPAs require notification as a term of the section 106 planning obligation for any scale of development).

Community infrastructure levy

3.109 *The Community Infrastructure Levy Regulations 2010* allow local authorities to raise funds from developers undertaking new building projects in their area. The CIL money must be used to fund infrastructure to support new development and may include roads and other transport facilities, flood defences, schools, medical facilities, sport and recreational facilities and open spaces. The regulations control the way in which a CIL scheme is introduced and the process is subject to public consultation.

3.110 The regulations require two distinct aspects to be considered. First, the "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 such as affordable housing, which will continue to be secured though planning obligations. In order to ensure that CIL and planning obligations are not duplicated and operate in a complementary way, the regulations 122 and 123 impose certain limitations on the use of planning obligations: see **paragraphs 3.100 - 3.101**.

3.111 The levy will be expressed as £ per square metre 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.

3.112 The process of preparing a charging schedule requires charging authorities to 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.

3.113 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.

Planning appeals

Introduction

3.114 Where a planning application is refused, or a decision is not made within the statutory period allowed (or any agreed extension to it), 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 new application;
- making an application to vary or delete the condition (section 73 application);
- submitting an application for an alternative scheme;
- appealing against the decision.

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Timescale

3.115 An appeal against the refusal of planning permission, or the discharge of reserved matters or the imposition of conditions must be lodged within six months of the LPA's decision (that is, the date that appears on the refusal/approval notice). Where an appeal is to be made against non-determination, the appeal period is six months from the end of the period within which the decision should have been made: either the statutory period or such extended period as has been agreed in writing between the applicant and the LPA. The Planning Inspectorate will not normally allow an appeal to be made outside the six-month period and it is very important, therefore, that planning application periods are monitored closely.

Methods of appeal

3.116 An appeal is made to the Welsh Ministers and dealt with on their behalf by the Planning Inspectorate (PINS). Most appeals are determined by an appointed inspector but, for some more complex or more contentious appeals, the Inspector will make a recommendation and the determination will be made by the Welsh Ministers. There are three types of appeal procedure: written representations, informal hearing and public inquiry. The starting point in each case is the submission of the appeal form (obtainable from PINS, on-line or through the Planning Portal) and the grounds of appeal.

Written representations

3.117 This is usually the quickest and least expensive type of appeal procedure: it is most appropriate where the issues in dispute are relatively simple and straightforward.

3.118 The appeal progresses by an exchange of written statements between the appellant and the LPA; other parties, including local residents, may make written comments also. The inspector will consider all representations made within time, visit the appeal site and determine the appeal. No opportunity is allowed for an oral presentation of the arguments or for cross-examination.

3.119 The most recent (2015/16 Annual Report) PINS data for Wales shows that 85 % of written representations appeals are determined within 16 weeks of the starting date (which is determined by PINS on receipt of a valid appeal).

Hearing

3.120 This procedure is intended for fairly straightforward appeals where the appellant or the LPA wishes to debate the issues in front of an inspector. Legal representation is not normally allowed, although consultants are allowed to present the case in a debate, which is led by the inspector. Cross-examination is not allowed but questions may be put to the other side through the inspector. As with written representations, the inspector will visit the appeal site during the course of or, more usually, at the end of the hearing.

3.121 The most recent PINS data for Wales shows that 85 % of hearing appeals are determined within 22 weeks of the starting date.

Inquiry

3.122 This procedure is most appropriate for large, complex or controversial schemes and where cross-examination of expert witnesses is considered necessary. This procedure is the most costly and time-consuming, and usually (but not necessarily) involves the use of legal representatives, either solicitors or barristers.

3.123 The most recent PINS data for Wales shows that 85 % of inquiry appeals are determined within 30 weeks of the starting date.

3.124 Whatever appeal method is used, appeal decisions are subject to challenge in the High Court, but only on points of law. Any legal challenge must be made within six weeks of the decision.

3.125 A careful evaluation of the costs and benefits should be taken by an NHS organisation before lodging an appeal and, in appropriate cases, an opinion on the likelihood of succeeding on appeal may be obtained from a planning consultant or a planning barrister. Once an appeal has been lodged, strict timescales apply and both parties are expected to abide by them and to behave reasonably in all respects. Unreasonable behaviour – such as the late withdrawal of an appeal or the failure to support a refusal reason – can lead to an award of costs against the appellant or the LPA, as the case may be.

3.126 Where early information indicates that there may be a significant conflict with the development plan or national planning guidance, this should be carefully considered before resorting to appeal.

Enforcement

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

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

- enforcement notices;
- enforcement warning notices;
- stop notices;
- temporary stop notices;
- planning contravention notices (although this is only a tool to obtain information about the site/occupier etc);
- breach of condition notices;

- amenity notices (served should land and/or buildings be in a condition that is considered detrimental to the amenity of an area);

- injunctions.

3.129 On receipt of any of the above notices or injunctions seeking compliance with planning regulations, a solicitor 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.

3.130 The 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.

Special interests

Listed buildings

3.131 *The Planning (Listed Buildings and Conservation Areas)* Act 1990 – as amended by the *Historic Environment (Wales)* Act 2016 – contains, among other things, provisions for the protection of buildings considered to be of special architectural or historic interest ("listed buildings"). In Wales the list is maintained on behalf of the Welsh Ministers by Cadw and the buildings are graded as grade I, II* or II.

3.132 Buildings are listed as a result of area or building type surveys by Cadw. They may also be "spot-listed" if they are thought to be vulnerable to demolition or neglect. Anyone can ask that a building be listed. The *Historic Environment (Wales)* Act 2016 introduces a new procedure which requires the Welsh Ministers to serve a notice on "appropriate persons" (including the owner and occupier) when they intend to include a building on the list and allow a period within which representations may be made. The Act provides for interim protection of the building while the consultation is undertaken.

3.133 The listing extends to any structure affixed to the building and to structures within the curtilage of the listed building, such as garden walls, outbuildings, etc., known as curtilage listed buildings.

3.134 The 2016 Act provides for applications to be made to the Welsh Ministers for certificates of immunity; previously, such applications could be made only when an application for planning permission had been made or planning permission granted. If granted, the certificate will preclude the building from being listed for a period of five years. Applying for a certificate carries with it a risk that the building will be listed so the pros and cons of making such an application need to be carefully considered. Specialist advice should be sought concerning this procedure.

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3.135 An owner of a listed building may be required to carry out essential repairs by the service of an urgent works notice. Previously such notices could be used only on unoccupied listed buildings; the 2016 Act has extended the provision to all listed buildings provided the works do not interfere unreasonably with its residential use. It is therefore advisable to keep listed buildings in good repair.

3.136 Listed building consent is normally required for any alteration (including internal alterations) to a listed building and is additional to any requirement for planning permission. Unauthorised works to a listed building are a criminal offence and the 2016 Act has introduced listed building temporary stop notices, designed to bring unauthorised works to an immediate halt, to avoid the risk of further damage to a building's historic fabric.

3.137 Listed building consent is also required prior to demolishing a listed building. Such consent is granted only in exceptional circumstances and when certain tests have been met: see paragraph 5.15 of TAN 24. Mounting a case to secure consent may be expensive, but should not be presumed to be impossible. Consideration of this action should be taken only after seeking specialist planning and legal advice. From 1 September 2017, all applications for listed building consent are required to be accompanied by a heritage impact statement.

3.138 Whenever an NHS organisation wishes to alter or dispose of a listed building it should appoint a consultant with specialist historic buildings experience to advise and negotiate the most beneficial planning permission and listed building consents.

3.139 The effect of proposed development on a listed building is a material planning consideration that must be taken into account by the LPA in reaching its decision: see section 66 of the Planning *(Listed Buildings and Conservation Areas)* Act 1990. This statutory duty applies not only to the listed building itself but also to its setting.

Conservation areas

3.140 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 designation but representations (prior to the decision being made) will be considered by the LPA.

3.141 Once a conservation area has been designated:

- there will be extra controls on the demolition of any property in the conservation area: conservation area consent (which is separate from and additional to planning permission) will probably be required and applications for consent must be accompanied by a heritage impact statement: see section 6 of TAN 24;

- any development must preserve or enhance the character and appearance of the conservation area – this is a statutory test: section 72 of the *Planning (Listed Buildings and Conservation Areas)* Act 1990;

- trees, whether or not protected by a tree preservation order, cannot be felled without the consent of the LPA being first obtained;

- some permitted development rights may have been withdrawn by the LPA (using what is called an article 4 direction), meaning that more types of development will require a specific grant of planning permission;

- outline planning applications will not normally be accepted and the LPA has the power to require that any application should be for full planning permission.

3.142 If designation as a conservation area is likely to adversely affect future developments, representations to the LPA should be prepared by a planning consultant with conservation experience. Although the design quality of a scheme is always a material planning consideration, it is likely to be more significant for a scheme located in a conservation area.

Registered parks and gardens and historic landscapes

3.143 For some years Cadw has maintained a non-statutory *Register of Landscapes, Parks and Gardens of Special Historic Interest in Wales.* The register lists and provides detailed records for a large number of landscapes, parks and gardens. Current national planning policy advice on the use of the register is contained in paragraph 6.5.26-28 of PPW and section 7 of TAN 24. Paragraph 6.5.26 of PPW requires that Cadw should be consulted on planning applications for development that is likely to affect the site of a registered historic park or garden or its setting. The effect of proposed development on a registered park or garden should be a material consideration in the determination of a planning application.

3.144 In respect of registered historic landscapes, paragraph 6.5.27 of PPW states that, information on the register should be taken into account by LPAs in considering the implications of developments that meet the criteria for EIA and that Cadw must be consulted. Cadw and Natural Resources Wales have published a practice guide on using the register, which includes a method (known as ASIDOHL2) for assessing the effects of proposed development on a registered historic landscape.

3.145 The 2016 Act requires the Welsh Ministers to compile and maintain a statutory register – known as The *Register of Historic Parks and Gardens in Wales* – to cover parks, gardens, designated ornamental landscapes, places of recreation and other designed grounds. The registration may include any building, water or land on or adjacent or contiguous to the grounds. Cadw has recently undertaken surveys to compile the statutory register and is currently (April 2018) consulting owners on them.

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Scheduled monuments

3.146 The *Ancient Monuments and Archaeological Areas Act 1979* gives protection to monuments (not all of which are ancient) included on a schedule prepared on behalf of the Welsh Minsters by Cadw. Works to a scheduled monument require scheduled monument consent, which is separate from and additional to any requirement for planning permission. The 1979 Act is amended by the Historic Environment (Wales) Act 2016, which introduces, among other things: changes to the procedure for scheduling; statutory protection for a monument while the Welsh Ministers decide whether to include it in the schedule; changes to the procedures for obtaining scheduled monument consent; scheduled monument enforcement notices and appeals; temporary stop notices; etc. Policy advice is provided in annex A of TAN 24.

Trees and hedgerows

3.147 Section 198 of the 1990 Act sets out the procedure for the protection of trees, whether individually, in groups or areas, or as woodland, through the issue of tree preservation orders (TPOs). These orders prevent the lopping, felling and cutting down of trees without the prior consent of the LPA.

3.148 On receipt of a notice of a TPO, an owner has 28 days in which to object. The following procedures should be followed:

- if the trees are manifestly unsuitable for protection (that is, they are dead or dangerous), the NHS organisation should inform the LPA that they should not be included in the TPO and, in consultation with the LPA, 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 NHS organisation should object to the order. A specialist arboriculturalist experienced in appeals work should be instructed to prepare a report on the age, condition and amenity value of the trees. If the trees are not worthy specimens, they may be able to persuade the LPA to change its mind;
- beware 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 (usually at a ratio of 2:1 for each tree lost).

3.149 *The Hedgerows Regulations 1997* (1997 No. 1160), enforced by the LPA, protect "important hedgerows" from being removed. These are defined as hedgerows that have been in existence for 30 years or more and which have, according to the criteria set out in schedule 1 of the regulations, value in relation to archaeology and history, and wildlife and landscape. It is a criminal offence to remove a section of hedgerow in contravention of the regulations.

3.150 The regulations apply to hedgerows growing in, or adjacent to, any common land, protected land (local nature reserves and areas of special scientific interest) or land used for agriculture, forestry or the breeding or keeping of horses, ponies or donkeys if it: (a) has a continuous length of at least 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.

3.151 In order to seek consent to remove an important hedgerow, an application for a hedgerow removal notice needs to be submitted to the LPA prior to its removal. The LPA has a period of six weeks in which to determine whether the hedgerow is "important" and whether: either there are grounds for its removal and therefore issue a hedgerow removal notice; or there are no grounds for its removal and therefore issue a hedgerow retention notice. The removal of a hedgerow is permitted under certain other circumstances, including where it is necessary to implement a planning permission.

Public rights of way

3.152 The effect of development on a public right of way (public footpath, bridleway, etc) may be a material consideration in the determination of a planning application or appeal. Where it is necessary, as a result of development, to stop-up or divert a right of way, the appropriate statutory procedures should be followed. These can be time-consuming and the outcome uncertain and the risk entailed should not be overlooked when planning the project.

Outdoor advertisements

3.153 The statutory controls on outdoor advertisements seek to protect public safety and amenity. The requirements are set out in the *Town and Country Planning (Control of Advertisements) Regulations 1992* as amended and policy advice in section 3.4 of PPW and TAN 7.

The Welsh language

3.154 In recent years, increased prominence has been given to the impact of development on the Welsh language. The Welsh Government is committed to supporting and encouraging the Welsh language. The *Well-being of Future Generations (Wales) Act 2015,* in imposing a duty on all public bodies to carry out sustainable development, seeks to maximise their contribution to the Welsh Government's well-being goals, which include *'A Wales of vibrant culture and thriving Welsh language'*.

3.155 Consideration of the place of the Welsh language in the planning process now figures in the following provisions:

- When preparing the NDF and any SDP, the sustainability appraisal must include an assessment of the likely effects of the plan on the use of Welsh in Wales or the SPA, as appropriate (sections 3 and 6 of the 2015 Act inserting sections 60B and 60I in the 2004 Act).

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- When preparing a LDP, the sustainability appraisal must include an assessment of the likely effects of the plan on the use of the Welsh language in the area of the authority (section 11 of the 2015 Act amending section 62 of the 2004 Act).

- When considering a planning application a LPA must have regard to any material considerations and, specifically, '*...any considerations relating to the use of the Welsh language, so far as material to the application*' (section 31 of the 2015 Act amending section 70 of the 1990 Act.

3.156 PPW section 4.13, TAN 20 *Planning and the Welsh Language* (which includes a section on practice guidance) give guidance on this matter, including the use of Welsh language impact assessments.

Chapter 4

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 NHS organisations 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, and a report should be submitted to the board.

4.4 Specialist Estates Services should manage the disposal of freehold land and property on behalf of NHS Wales organisations.

Principles of disposal

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

4.6 Once land and/or property has been identified as surplus to a particular NHS organisation, through Specialist Estates Services, it should:

- check what legal interest it holds and whether the property is registered in its name at the Land Registry;
- circulate details of the land and/or property to nearby NHS organisations;
- enter details of the land and/or property onto the ePIMS register of property for sale to enable other public sector organisations to come forward to register their interest in purchasing the land and/or property. This notification should allow 40 days for a purchaser to emerge before placing the property on the open market.
- Contact the local authority to establish, where the land and/or property is deemed suitable, whether there is any requirement for the development of affordable housing.

See **paragraphs 4.18 - 4.21** on priority purchasers.

4.7 Disposals between public sector organisations should endeavour to use the Estate Co-ordination & Land Transfer Protocol (Land Transfer Protocol) whenever possible. The Land Transfer Protocol is a Best Practice Guide for the disposal, transfer, shared use and co-occupation of land and property assets between publicly funded bodies in Wales developed by the National Assets Working Group in 2014.

4 Disposal of freehold land and property

4.8 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 4.22 – 4.31** for further details).

4.9 Where an NHS organisation 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.

4.10 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.

4.11 Powers are available to NHS organisations to obtain an income from land and property (see **paragraphs 1.39 – 1.41**), where it is not possible to secure an early sale, and such income may assist in reducing holding costs during the disposal process.

4.12 All disposals should be fully supported by a business case for the transaction (see **paragraphs 4.32 – 4.38** for details). A cost-benefit analysis of the disposal options should inform the business case.

4.13 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.

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

4.15 The file should record:

- when the property became non-operational;
- when the property was formally declared surplus to requirements;
- 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 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.

4.16 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.

4.17 The vendor should reserve the right of entry onto sold land and property to carry out 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.

Priority purchasers

4.18 A priority purchaser is an NHS organisation or non-NHS organisation that provides social or healthcare services under a contract from a Health board (or joint funding from a Health Board and local authority). Where no health or social care service use has been identified, the property should be offered for affordable housing in accordance with the protocol *Provision of NHS Land for Affordable Housing* – Welsh Health Circular (2007)088 dated 11 December 2007. If the site is deemed unsuitable or not required for affordable housing a priority purchaser is any other public-sector organisation, provided the property is required only for its own use.

4.19 NHS organisations wishing to dispose of land and/or property should offer the land/property to priority purchasers in the first instance. If these purchasers can re-use the land and/or property, it is not classified as surplus to NHS requirements.

4.20 Public organisations may transfer assets between themselves without placing the property on the open market provided they endeavour to use the Land Transfer Protocol (see **paragraph 4.7**) wherever possible and do so at market prices. It is good practice to commission a single independent valuation to settle the market price to be paid (preferably through the Valuation Office Agency / District Valuer Services).

4.21 For advice on the protocols and priority purchasers, contact Specialist Estates Services or the Welsh Government.

Former owners' rights (Crichel Down rules)

4.22 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 Disposal of freehold land and property

4.23 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.

4.24 Recent guidance on the Crichel Down rules (set out in *'Compulsory purchase process and the Crichel Down Rules'*, DCLG 29th October 2015) only partially applies in Wales in respect of land acquired and still owned by a UK Government department. Save for the partial application of the 2015 guidance, the principles set out in *'The Crichel Down Rules'* issued by the Department of the Environment and the Welsh Office on 30th October 1992 still apply to land in Wales.

4.25 The obligation to offer back does not apply to:

- land that was available 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;
- non-agricultural land which becomes surplus and available for disposal more than 25 years after the date of acquisition.

4.26 The following are exemptions to the obligation to offer back:

- land and property whose character has materially 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);
- where it would be mutually advantageous to effect minor adjustments in boundaries with an adjoining owner through an exchange of land;
- where disposal would be inconsistent with the purpose of the original acquisition;
- 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.

4.27 Specialist Estates Services (and solicitors if necessary) should be consulted to determine whether the Crichel Down rules apply.

4.28 Land and property qualifying for offer back will be offered to the former freeholder. Former leaseholders may also qualify if the land was subject to a long lease and a significant unexpired term remains (of 21 years or more).

4.29 A former owner usually means a former freeholder or former long leaseholder and his or her successor.

4.30 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.

4.31 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

4.32 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.

4.33 If the sale of land and property is a key part of meeting re-provision 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.

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

4.35 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.

4.36 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.

4.37 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.

4.38 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

4.39 Whenever a disposal is contemplated, Specialist Estates Services should be instructed to manage the disposal process and a technical team appropriate to the size and complexity of the transaction should be appointed from the outset through to completion of the scheme.

4.40 The team should be led by Specialist Estates Services who will act as the informed client, reporting to the NHS organisation, 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.

4.41 Specialist Estates Services has 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

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

Major/complex disposals

4.43 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. Specialist Estates Services will recommend a suitably qualified valuer to provide this advice and they may need to be appointed, together with the solicitor and selling agent, at the beginning of the project.

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

4.45 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.

4.46 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.

4.47 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.

4.48 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.

4.49 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

4.50 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**).

4.51 The benefits associated with securing planning permission should outweigh the costs of obtaining it, taking into account holding and opportunity costs and potential overage or clawback provisions (see **paragraphs 4.67 – 4.74**).

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.

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

4.53 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;
- the presence of invasive species (Japanese knotweed, Himalayan balsam etc);
- updating fire risk assessments.

4 Disposal of freehold land and property

4.54 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

4.55 When disposing of sites, NHS organisations 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.

4.56 Accessible asbestos insulation should already have been identified.

4.57 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.

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

4.59 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

4.60 Whenever NHS organisations sell surplus land, with or without buildings, it is essential they address the issue of contamination.

4.61 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'.

4.62 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.

4.63 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.

4.64 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.

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

4.66 It is essential that NHS organisations keep 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

4.67 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.

4.68 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.

4.69 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 usually described, there are many types and varieties of clawback and overage provision so care should always be taken when reviewing or imposing such provisions.

4.70 Professional advice should be taken from Specialist Estates Services and solicitors on overage and clawback options throughout the disposal process to ensure that it is relevant and appropriate for the transaction.

4.71 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 to ensure the trigger events for exercising the overage provision are clearly understood.

4.72 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.

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

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

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 sub-sale 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 adversely affect the initial market price but ensure that any significant uplift is shared.

Disposal of partially surplus sites

4.75 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.

4.76 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.

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

4.78 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

4.79 Where NHS organisations are selling land that adjoins land with future development potential, they should consider retaining strips of land (ransom strips) on their site to provide access to the adjoining land. Legal advice should be taken on this issue.

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

4.81 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.

4.82 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

4.83 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.

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

4.85 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

4.86 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.

4.87 The NHS organisation should ensure that its right to continue to use the facility is preserved for as long as it is likely to be required.

4.88 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 will provide value for money.

Sale of surplus property in PFI schemes

4.89 Any such transfer should represent value for money and not compromise the long-term delivery of NHS services.

4.90 An NHS organisation embarking on any work involving a PFI deal should first seek advice from the Welsh Government and Specialist Estates Services.

Disposal of freehold land and property

Provision of new facilities in exchange for surplus land and property

4.91 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 1.64 – 1.85**).

4.92 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.

4.93 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.

4.94 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

4.95 "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.

4.96 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?

4.97 The sale price is usually assessed at the time the property is sold. However, accounting rules apply to disposals and 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.

4.98 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 4.67 – 4.74** for details).

4.99 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.

Disposal of freehold land and property

When is payment made?

4.100 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

4.101 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 4.67 – 4.74** for details).

Sales on

4.102 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 (**paragraphs 4.67 – 4.74** for details).

Rent and other lease terms

4.103 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.

4.104 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

4.105 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.

4.106 The NHS 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.

4.107 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).

Note:
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

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

4.109 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.

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

Contracts conditional on planning permission

4.111 Where planning issues are complex, or an outcome too uncertain for the NHS organisation 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.

4.112 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.

4.113 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.

4.114 The disposal team should advise:

- whether a deposit should be paid, how much it should be 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 3.94 – 3.104** 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 4.67 – 4.74** for details).

Phased-sale contracts

4.115 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.

4.116 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 4.67 – 4.74** for details).

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

4.118 The NHS should not provide a "loan" to the developer in such cases.

4.119 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.

4.120 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 3.94 – 3.104** 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 NHS organisation

4.121 Where the land and property is required for use by another NHS organisation, it should be transferred at net book value.

Valuation in preparation of sale of land and property

4.122 When a sale of surplus land and buildings is being scheduled, NHS organisations should take professional advice on how and when the value of the asset should change in their accounts.

4.123 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.

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

4.125 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.

4.126 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.

Disposal of freehold land and property

Role of suitably qualified valuer

4.127 The suitably qualified valuer (Valuation Office Agency or private-sector valuer) should work with Specialist Estates Services and 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

4.128 NHS organisations should 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.

4.129 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.

4.130 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.

4.131 NHS 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.

4.132 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 4.83 – 4.85** on joint ventures). However, "speculative" purchases should not be made.

4.133 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.

4.134 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.

Disposal of freehold land and property

4.135 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 4.67 – 4.74** explain the options to maximise the sale proceeds.

4.136 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.

4.137 For the sale of historic buildings, see **paragraphs 4.195 – 4.196.**

Sale to a selected purchaser (solus transaction)

4.138 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.

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

4.140 NHS organisations wishing to dispose of property in this way should, through Specialist Estates Services, first secure valuation advice from two suitably qualified valuers (normally one being the Valuation Office Agency). If both agree to the price, the sale can proceed.

4.141 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.

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

4.143 A selected purchaser may be a purchaser with a special interest (see **paragraph 4.130** for details).

Sale at concessionary price

4.144 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.

4.145 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.

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

4.147 Approval is then required from the Health Secretary if the concession exceeds certain specified limits in case the sale is classified as a 'gift' and has to be reported to the Welsh Government. Where approval is required from the Health Secretary, the NHS organisation will brief the Health Secretary, if required.

Note:
Currently the specified limit is £100,000, but the latest limit should always be checked.

4.148 An overage or clawback provision (see **paragraphs 4.67 – 4.74** for details) should be included in case the purchaser subsequently sells at a higher price, provided the accountable officer and, where appropriate, the Health Secretary are prepared to defend the sale as a deliberate concession.

Sale methods

4.149 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.

4.150 Specialist Estates Services advice must be sought on the appropriate method of sale. Disposals must comply with public accountability requirements.

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

Formal tender

4.152 The property should be widely advertised and marketed for a 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.

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

4.154 All interested parties should be sent an information pack comprising relevant technical information such as 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.

4.155 Advantages of formal tender 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.

4.156 Disadvantages of formal tender 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.

4.157 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

4.158 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.

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

4.160 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.

4.161 Advantages of limited formal tender 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.

4.162 Disadvantages of limited formal tender 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

4.163 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.

4.164 Advantages of informal tender 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 4.67 - 4.74**);
- 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.

4.165 The disadvantage of informal tender is that the purchaser is not bound to proceed at the price offered.

Private sale

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

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

4.168 The agent should recommend which offer should be accepted.

4.169 Advantages of a private sale 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.

Disposal of freehold land and property

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

4.171 Disadvantages of a private sale 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.

4.172 Suggested uses include:

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

Public auction

4.173 The land and/or property should be widely advertised and marketed ahead of the auction.

4.174 An auction guide price, or guide range, should be set prior to the commencement of marketing. The guide price or range will be determined through consultation between the auctioneer, Specialist Estates Services and the NHS organisation. Guide prices and ranges can be adjusted during the period up to the auction in order to take account of the state of the market and/or the level of interest in the land/property. Care should be taken when setting or adjusting the guide price and should not be deliberately set at an artificially low level to generate interest before a much higher reserve price is adopted on the day of the auction.

4.175 An auction reserve price should be confirmed shortly before the auction and will be determined through consultation between the auctioneer, Specialist Estates Services and the NHS organisation and will be informed by feedback in the pre-sale period. Following a ruling by the Advertising Standards Authority in 2014, the RICS recommends that the reserve price falls within the guide price range or within 10% of a single figure guide price.

4.176 The reserve price will be known only to those involved in the sale and not to those bidding.

4.177 Advantages of public auction 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.

4.178 Disadvantages include:

- some potential purchasers dislike auction procedures and their offer 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);
- a failure to sell at auction may blight a site.

4.179 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

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

4.181 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.

4.182 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.

4.183 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.

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

4.185 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. Careful consideration should be given to balancing the needs of best price, public accountability and bad publicity.

Post-completion

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

- update its asset register records, including reference details of any Land Registry entry;
- notify Specialist Estates Services, giving details of any Land Registry entry, in order that the Land and Property Portfolio (LAPP) and ePIMS can be updated;
- 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.

4.187 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

4.188 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.

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

4.190 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.

4.191 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.

Dispute resolution

4.192 When agreeing contracts for the acquisition and disposal of both freehold and leasehold land and/or property, NHS organisations should seek to incorporate clearly worded dispute resolution clauses which will assist in resolving any disputes fairly, swiftly and at least cost.

4.193 Disputes should be resolved between the parties themselves whenever possible. If this is not possible, alternative forms of dispute resolution should be considered, such as mediation or third-party determination.

4.194 Where referral to a third-party for determination is necessary, it is preferable for this to be to an Independent Expert as opposed to an Arbitrator or the Courts. The independent expert process is generally quicker, less time-consuming and less costly than the alternatives.

Sale of surplus historic estate

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

- local planning policy (see **paragraphs 3.33 – 3.38** for details);
- Welsh Government and national policy for conserving and enhancing the historic environment, including historic buildings (see *TAN 24 The Historic Environment* for current policy) - see **paragraph 3.79** for details;
- 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.

4.196 'Historic buildings and the health service in Wales' (Welsh Office, 1997) 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.
- The Local Planning Authority should be consulted at an early stage and it may be helpful to seek the view of Cadw on the special interest of a listed building.
- A planning brief, identifying the scope for change and planning constraints, should be prepared and agreed with the Local Planning Authority whenever possible.
- Surplus listed healthcare buildings should be marketed vigorously to find alternative uses.
- NHS organisations should take reasonable steps to ensure the financial viability of purchasers of vulnerable heritage assets and their ability to perform.

Disposal of burial grounds and war memorials

4.197 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

4.198 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.

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

War memorials

4.200 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.

4.201 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.

4.202 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.

4.203 See Note after **paragraph 2.209** for contact details of the aforementioned organisations.

Chapter 5

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 sub-letting all (or part) of the leased property to a sub-tenant.

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 Specialist Estates Services (and solicitors if necessary) should be taken in respect of landlord and tenant issues and Specialist Estates Services should manage the disposal of leasehold land and property on behalf of NHS Wales organisations.

Assignment

5.6 Assignment is the standard form of disposal for leasehold interests where the tenant 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 assignee 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.

5.16 Landlords will often require the tenant to enter into an AGA on assignment. This should be strongly resisted. However, given the exceptional strength of the NHS covenant, a landlord may be reluctant to dispense with the requirement for an AGA.

Surrender

5.17 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.

5.18 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.

5.19 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.

5.20 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).

5.21 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.

5.22 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.

5.23 Early advice from Specialist Estates Services and, where necessary, other professional advisers should be sought on the terms of the surrender and the calculation of payments to be made in either direction.

Sub-letting

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

5.25 Ideally, as many of the obligations in the lease should be stepped down into the sub-lease 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 sub-lessee. A schedule of condition or photographic survey should be carried out at the start of the agreement.

5.26 If the sub-lessee 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 sub-lease.

5.27 However, there may be significant management and administrative burdens if the sub-lessee proves to be unreliable.

5.28 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 sub-lease, unless these costs can be passed onto the sub-lessee.

5.29 The length of the sub-lease is flexible provided it does not exceed the length of the NHS organisation's lease.

5.30 If only part of the leased premises is surplus and the lease permits it, the NHS organisation may wish to sub-let part only. Additional consideration should be given to the contribution required from the sub-lessee 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?

5.31 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

5.32 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.

5.33 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.

5.34 The common 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 Disposal of leasehold land and property

5.35 Sub-letting of long leaseholds is not usual. Short-term sub-lets 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.

5.36 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.

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

Lease term

5.38 There normally needs to be a significant number of years (commonly 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

5.39 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

5.40 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

5.41 Are there any user provisions or restrictions? If so, how flexible are they?

Developmental potential

5.42 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.

5.43 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

5.44 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

5.45 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.

5.46 The marketability of the short lease and disposal options adopted, that is, assignment, sub-letting or possibly surrender, will be affected by the following.

Lease term

5.47 If the unexpired term of the lease is relatively short, 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.

5.48 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.

5.49 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.

5.50 If the lease term is short, a surrender may be accepted by the landlord subject to an agreed monetary settlement.

Rent level

5.51 If the passing rent is above current market rental levels, it may be difficult to sub-let the premises if the lease does not permit sub-lettings for less than the passing rent.

5.52 Under these circumstances, if the property is to be assigned and providing the lease does not prohibit it, a reverse premium may have to be paid to the assignee. The premium may be subject to VAT.

5.53 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

5.54 Is a rent review imminent or outstanding? Uncertainty in this respect can put off a prospective assignee or sub-lessee. Seek to resolve the review issue at the earliest possible time.

Alienation provisions

5.55 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.

5.56 The stronger the financial standing of the proposed assignee, the fewer preconditions the landlord is likely to insist upon.

User provisions

5.57 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

5.58 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

5.59 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

5.60 The extent of the tenant's repair liability in a short lease may be a significant issue in assessing its marketability.

5.61 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

5.62 A prospective tenant is likely to inspect the premises and make enquiries before completing the assignment or sub-lease to ascertain, among other things, whether the NHS organisation has already fully complied with the tenant's obligations in the lease.

5.63 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 sub-lease 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.

5.64 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.

5.65 For sub-letting, a direct payment or rent-free period to compensate for these works would be demanded by the sub-lessee. Check that such incentives are permitted by the lease.

Future breaches

5.66 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.

5.67 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).

5.68 In the case of sub-letting, the NHS organisation has greater control over its tenant through exercising rights reserved under the lease provisions.

Contractual expiry of leasehold interests

Vacant possession

5.69 Ensure that vacant possession and compliance with all lease terms is accomplished before the lease expiration date.

Repairing obligations

5.70 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.

5.71 Specialist Estates Services should manage the negotiations of all schedules of dilapidations.

Other breaches

5.72 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.

Disposal of leasehold land and property

5.73 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. Advice should be sought from Specialist Estates Services 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 sub-tenancies or licences

5.74 Sub-lessees or licensees may require notice from the NHS organisation to give up possession. It is better to secure possession from sub-lessees 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. Specialist Estates Services and legal advice should be sought before serving notice on sub-lessees or licensees.

Dispute resolution

5.75 When agreeing contracts for the acquisition and disposal of both freehold and leasehold land and/or property, NHS organisations should seek to incorporate clearly worded dispute resolution clauses which will assist in resolving any disputes fairly, swiftly and at least cost. See **paragraphs 4.192 - 4.194** for more detailed information.

Post-completion

5.76 Details of assignments, sub-lettings and surrenders should be recorded on the asset register. Specialist Estates Services should be notified in order that the Land and Property Portfolio (LAPP) and ePIMS can be updated.

5.77 The NHS organisation's solicitor should provide a summary of:

- any assignment and guarantees provided;
- the main terms of the sub-lease.

5.78 The solicitor should also provide details of the location of the legal documentation should any problems arise from a defaulting assignee.

5.79 Procedures should be in place in NHS organisations to ensure that the terms of any sub-lease are clearly known and monitored to ensure compliance with the sub-lease terms.

Chapter 6

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 NHS organisations are considering becoming landlords. Tenancy agreements should not interfere with the provision of health and social care. Specialist Estates Services should be instructed to manage all proposed and existing lease management arrangements.

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 1.39 – 1.41**). 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 1.39 – 1.41**.

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 NHS organisation 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 (although 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, exchanged and completed, otherwise a tenancy may be established by law that is different from that which was intended.

6 Granting of leases (and licences to occupy)

6.11 Property and legal advice from NHS Wales Shared Services Partnership should be taken in relation to the above and the following matters.

Code of commercial lease practice

6.12 NHS organisations should be aware of the 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 NHS organisation will require the property again, or it is to be disposed of.

6.14 If the precise date on which the NHS organisation will require the property again is not known, the lease may provide for the early termination by the service of a break notice 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 NHS organisation serves the termination or "break" notice correctly. Legal advice should be sought.

6.16 In most cases, the tenancy should be excluded from the security of tenure provisions of the *Landlord and Tenant Act 1954* to enable greater control over the tenancy and restrict the term to the original term of the lease with no right to automatically renew.

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 to protect a landlord's business (such as landlord's break clauses or use restrictions) may reduce the rent that prospective tenants are willing to pay.

Alienation provisions

6.19 It is important to clarify what assignment or sub-letting will be permitted. NHS organisations 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.

6 Granting of leases (and licences to occupy)

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 NHS organisation, as 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*, the Planning and Compulsory Purchase Act 2004 and the *Planning (Wales) Act 2015*. 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. Such notices should be served by a suitably qualified solicitor.

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 Granting of leases (and licences to occupy)

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. However, 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 to take effect immediately after the current lease has expired.

6.35 If this is not possible legal advice should be sought. The safest course of action may be 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 is to be renewed, advice should be taken to ensure that the NHS organisation's interests are protected.

6.37 Rent payment (cash or in kind) should not be accepted after the expiry of the lease, unless a new lease is in place, 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 NHS organisation's notice of dilapidations etc and therefore the lease terms should be checked.

6.39 On lease expiry, it is usual for the lease to require the land and property to be reinstated to its original condition by the tenant. Alternatively, if appropriate, the NHS organisation, through Specialist Estates Services, may negotiate a financial 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".

6 Granting of leases (and licences to occupy)

Letting retail outlets

6.41 There are many ways of delivering and procuring retail outlets and advice from Specialist Estates Services and solicitors should be sought when considering transacting with developers or retailers.

6.42 In some circumstances retail outlets can generate competitive returns for operators and developers. NHS organisations 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 NHS organisations obtain 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 Welsh Government policy (healthy food offering);
- fast food chains and other operators that would reflect negatively on the NHS should be excluded;
- the impact of exclusivity clauses;
- 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;
- the potential financial impact of a separate business rates assessment for the outlet;
- 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 - 6.48**);

- 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 Welsh Risk Pool the NHS organisation should discuss and arrange the insurance with the Welsh Risk Pool. The tenants may have to insure liabilities not under the Risk Pool cover, for example public liability insurance.

6.48 In circumstances where the retail unit is insured under the Risk Pool cover, consideration (at heads of terms stage) should be given to recharging the tenant a sum equivalent to the market premium.

Joint ventures

6.49 When letting land and property where joint ventures with others (for example laundry, computer suite, boiler house, 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

6.50 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.

6.51 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.

6.52 NHS organisations will need to ensure that the service provider does not inadvertently acquire 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

6.53 Leases fall within the provisions of the *Telecommunications Act 1984* and the *Communications Act 2003* (the so-called "code powers"). These code powers were the subject of criticism by the courts and practitioners for being unclear and inaccessible. The *Digital Economy Bill 2017* received Royal Assent on 27 April 2017 and introduced a new code to replace the previous Electronic Communications Code set out in Schedule 2 to the *Telecommunications Act 1984*. The new code will contain some significant changes in relation to rights to assign, upgrade or share apparatus.

6.54 In deciding whether to grant a lease, NHS organisations should take specialist advice and weigh the short-term financial benefits of the rental income against future estate management issues.

6.55 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.

6.56 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*.

6.57 Contracting out of the *Landlord and Tenant Act 1954* rights and including in the lease a landlord's break clause (to be exercised when the land and property becomes surplus or the presence of apparatus begin to prejudice the NHS organisation's operational requirements) may not be sufficient to ensure that the NHS organisation can regain possession of the land and buildings subject to the lease.

6.58 The process for obtaining possession under the code powers through the courts (if no settlement can be negotiated) can be lengthy, expensive and uncertain.

6.59 In some instances, 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.

6.60 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 telecoms equipment.

6.61 Other considerations include:

- the premises let will include the air-space occupied by masts plus any equipment storage area;

- the lease should require the tenant to ensure that the apparatus is not readily accessible by members of the public, and is appropriately located and secure;
- the lease length should be given careful consideration. Security of income should be weighed up against the flexibility to secure vacant possession;
- all equipment should be compatible with the NHS organisation's electronic apparatus and provision should be included in the lease that the equipment can be removed/moved if it interferes with the NHS organisation'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 NHS organisation for its losses as a result of the exercise of code powers.

Letting of advertising hoardings

6.62 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 advice from Specialist Estates Services on market rents and terms of the proposed tenancy. The prospective tenant's first offer should seldom be accepted, since they will often be prepared to negotiate.

6.63 Statutory controls for outdoor advertising are set out in the *Town and Country Planning (Control of Advertisements) Regulations 1992* as amended and policy advice in section 3.4 of *Planning Policy Wales (PPW)* and Technical Advice Note 17 (TAN 17). Care should be taken to ensure that any lease of a hoarding site is properly tied in with the planning requirements. Breach of the relevant legislation is a criminal offence.

6.64 Ensure that all necessary consents are in place, as a landowner can be held liable for the display of unauthorised advertisements.

6.65 Ensure that the tenant is responsible for all ongoing maintenance and running costs of the hoarding (including repairs and utilities).

Letting of noticeboards

6.66 NHS organisations should have a clear policy on the use of posters on noticeboards within their premises or at premises where NHS services are being carried out.

6.67 Posters should contain non-offensive information.

6.68 Monitoring arrangements should ensure that inappropriate advertisements or fly-posters are not put up or are removed promptly.

6.69 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.

6.70 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 Welsh Government or NHS policy.

6.71 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

6.72 Transactions and transfers of land and property between NHS organisations take place regularly. 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.

6.73 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 of occupation (MOTO) 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 MOTO. Alienation provisions should not normally be allowed or should 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.

6.74 Arrangements between NHS organisations that need (for operational reasons) to be longer than five years may best be documented by a formal lease. This will be helpful if the freehold interest is transferred to a non-NHS organisation.

6.75 Accommodation within part of a building should be made available to other NHS organisations on the basis of a market rent, plus a service charge.

6.76 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.

6.77 Where it is appropriate to adopt a MOTO, the memorandum should:

- apportion responsibility for repairs, insurance and compliance with statutory requirements;
- restrict the use of the premises and prohibit 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 MOTO are surrendered. If it is agreed that the occupier is to remain in occupation of the property a formal lease should be put in place on terms to be agreed.

6.78 The key terms of any such memorandum should be recorded in the NHS organisation's asset register. Key documents must be kept in a safe place, perhaps with the organisation's solicitors.

Disputes between NHS organisations

6.79 Disputes between NHS organisations on the interpretation of memoranda, or any land and property-related matter, should be resolved within the NHS without reference to either formal arbitration or the courts.

6 Granting of leases (and licences to occupy)

Arrangements with non-NHS organisations

6.80 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.

6.81 To ensure that the tenant in question does not acquire security of tenure, the NHS organisation should exclude the relevant provisions of the *Landlord and Tenant Act 1954*.

6.82 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 6.94 – 6.101**);
- 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.

6.83 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.

6.84 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. NHS organisations 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

6.85 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.

6.86 Where a joint hospital and university medical school development takes place, the arrangement with the university will vary as follows:

- where an NHS organisation 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.

6.87 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 NHS organisation receives from the university.

6.88 The NHS organisation 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 NHS organisation can terminate the lease (so that the premises would be available for another provider).

Arrangements with educational establishments (embedded accommodation)

6.89 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.

6.90 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.

6.91 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.

6.92 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.

6.93 Cost-sharing principles should be agreed before the outline business case is finalised in order to provide a greater degree of financial certainty to all parties during the procurement.

Concessionary leases

6.94 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.

6.95 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.

6.96 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.

6.97 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.

6.98 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.

6.99 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 sub-letting;
- 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.

6.100 Any concession must be approved by the NHS organisation's board, which will want to consider the business case in order to make an appropriate decision.

6.101 Where the concession has a value of £100,000 or more (see **paragraph 4.147**), approval should also be secured from Welsh Government's Health and Social Services Group before it is agreed. Proposed concessionary leases that may be novel or contentious should also be referred to the Welsh Government for consideration. If the concession is seen to be a 'gift', it may need to be reported to the Welsh Government in plenary session.

Dispute resolution

6.102 When agreeing contracts for the acquisition and disposal of both freehold and leasehold land and/or property, NHS organisations should seek to incorporate clearly worded dispute resolution clauses which will assist in resolving any disputes fairly, swiftly and at least cost. See **paragraphs 4.192 - 4.194** for more detailed information.

Post-completion

6.103 Details of any leases and licences granted by NHS organisations should be recorded on the asset register. Specialist Estates Services should be notified in order that the Land and Property Portfolio (LAPP) and ePIMS can be updated.

6.104 A summary of each lease and licence should be prepared, and copy documents retained by the NHS organisation and provided to Specialist Estates Services to enable the let premises to be properly managed.

Chapter 7

Acquisition of freehold land and property

Introduction

7.1 This chapter deals with acquisitions by NHS organisations of freehold land and property. Some of the provisions apply equally, however, to leasehold acquisitions.

7.2 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

7.3 All NHS organisations should be aware of their delegated limits before proceeding with any property-related transaction (see **paragraphs 1.45 – 1.48** for details).

7.4 NHS Wales organisations should liaise with and instruct Specialist Estates Services to manage land and property acquisitions on their behalf.

Principles of acquisition and due diligence

7.5 There are often changing requirements, guidance, policies and regulations on acquisitions of property for all public sector organisations. It is advisable for NHS organisations to keep up to date on these requirements. For further information contact the Welsh Government's Health and Social Services Group and Specialist Estates Services.

7.6 Once an NHS organisation 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: **https://www.epims.ogc.gov.uk/ePIMSNet/epims_login.aspx?ReturnUrl=%2fepimsnet**
- 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 Specialist Estates Services.

7.7 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.

Acquisition of freehold land and property

7.8 When acquiring land with existing buildings or for new buildings, the following points should be observed:

- check how the site meets the established search 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;
- 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

7.9 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. NHS organisations should comply with governance and delegated limits, where applicable, when obtaining business case approval.

Managing the acquisition team

7.10 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.

7.11 The team should be led by Specialist Estates Services who will act as the informed client reporting to the NHS organisation to ensure that NHS interests are protected and managed at all times. The team should be suitably qualified, experienced and competent in the field of land and property transactions with good market and NHS knowledge.

7.12 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.

7.13 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.

7.14 Any legal constraints, such as covenants on the use of the land or other legal restrictions, should be addressed by the solicitor at an early stage, or the purchase should be abandoned, thus avoiding high abortive costs.

7.15 In cases where compulsory purchase is being considered, as much time as possible should be allowed for the necessary approvals and procedures (see **paragraphs 7.66 – 7.76** on compulsory purchase powers).

Town planning

7.16 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.**

7.17 Outline planning permission should be secured prior to purchase, although in certain circumstances an NHS organisation may have to obtain full planning permission or reserved matters approval 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 3.57 – 3.63** for details).

7.18 Prior to submitting a planning application, NHS organisations 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 7.42 – 7.48**).

7.19 The acquisition team should assess the impact of any planning conditions and/or obligations (section 106 Agreements/CIL). See **paragraphs 3.94 – 3.113** for details.

Site investigation report

7.20 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 development costs.

7.21 Where a site investigation report 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 the cost of the works.

7.22 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.

7.23 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

7.24 It is important to check whether the intended building works (including access arrangements) will involve diverting existing services, as this can be costly.

7.25 If services cross the site and need to be diverted, check the terms of any relevant wayleaves (see **paragraphs 2.110 – 2.118)**. 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.

7.26 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 requisitioning powers for connections to services before expensive payments are made to third-party landowners for easements.

Structural survey

7.27 When acquiring land with existing buildings intended for use, a 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.

7.28 This should ensure that realistic estimates of repair costs are included in the business case.

7.29 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 2010.*

7.30 The survey should be addressed to the NHS organisation, otherwise it will not be possible to make a claim for losses arising from a surveyor's negligence.

7.31 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).

Acquisition of freehold land and property

Valuations

7.32 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. In certain circumstances, it may be helpful to include a suitably qualified valuer with good local market knowledge in the business case team.

7.33 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 7.44 – 7.48**) and the effect on prices of changing market conditions.

7.34 The price being paid for any acquisition should be kept under review, with help from Specialist Estates Services and any valuer, until contracts for the purchase have been exchanged.

Negotiating the purchase

Freehold covenants

7.35 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.

7.36 A "positive covenant" is an agreement to do something relating to the use of land (for example erect 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.

7.37 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.

7.38 The Welsh Ministers' power to override covenants under Section 159 of the *National Health Service (Wales) Act 2006* (previously Section 87 of the National Health Service Act 1977) is not available to NHS organisations.

7.39 If NHS organisations 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*.

7.40 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.

7.41 Where the site is subject to existing restrictive covenants, these will be binding unless the site is newly acquired by compulsory purchase (see **paragraphs 7.66 – 7.76** 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

7.42 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.

7.43 In negotiating such contracts, ensure that:

- the steps required to satisfy the condition are clearly stated;
- the condition(s) can be waived by the NHS organisation;
- 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 NHS organisation decides not to waive the condition, the contract can be terminated;
- the NHS organisation 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 NHS organisation may not wish to proceed with the contract, so it needs to control the conditionality issues.

Option contracts (option to purchase)

7.44 Under an option contract, the landowner receives an agreed amount of money from a party 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.

7.45 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.

7.46 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.

7.47 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.

7.48 Points to consider 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 (as market values can be volatile, and excessive rises in the land cost could abort the project).

Heads of terms

7.49 Non-legally binding "heads of terms" should be agreed between the vendor and purchaser. Specialist Estates Services and 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

7.50 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.

7.51 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

7.52 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]."

7.53 Once a solicitor is instructed, all legal matters should be negotiated with reference to him/her.

7.54 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.

7.55 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.

7.56 Sale and purchase agreements typically provide that, from the date of exchange of contracts to the date of completion, the risk of holding the site normally passes to the purchaser and so, consequently, does the responsibility for insuring the property. In such circumstances, even if the property burns down before completion, the cost of reinstatement will have to be met by the purchaser (unless the vendor has wilfully damaged the property or failed to take reasonable care of it) but the vendor will be responsible for providing vacant possession.

7.57 Wherever possible, NHS organisations should seek to require the vendor to insure from the date of exchange of contracts to the date of completion (even if this cost is recharged to the purchaser) but this will often be resisted by the vendor, save in particular instances (see **paragraph 7.58**).

7.58 A vendor would invariably be responsible for insurance after exchange of contracts where, for example, the contract is conditional on the buyer obtaining planning consent for the property, or a new building is in the process of being constructed on the site.

7.59 Make sure that when documents are signed and/or sealed, standing orders are observed.

7.60 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.

7.61 When agreeing contracts for the acquisition and disposal of both freehold and leasehold land and/or property, NHS organisations should seek to incorporate clearly worded dispute resolution clauses which will assist in resolving any disputes fairly, swiftly and at least cost. See **paragraphs 4.192 - 4.194** for more detailed information.

Withdrawal of property from the market

7.62 Whenever an agreement to purchase has been reached, it should be stipulated that the vendor withdraws the property from the market.

Timetable

7.63 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.

7.64 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 with the legal title.

Post-completion

7.65 When the purchase has been completed, the NHS organisation should:

- update its asset register, giving reference details of the Land Registry entry;

- inform Specialist Estates Services in order that the Land and Property Portfolio (LAPP) and ePIMS can be updated;
- 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

7.66 When a preferred site has been identified and appropriate planning permission obtained, if satisfactory terms for acquisition cannot be agreed with the owner, an NHS Trust or Health Board may, as an exception, consider acquiring the site under a Compulsory Purchase Order (CPO).

7.67 Paragraph 27, Part 2 of Schedule 3 of the *National Health Service (Wales) Act 2006* enables an NHS Trust to purchase land compulsorily for the purposes of its functions subject to confirmation of the Order by the Welsh Ministers.

7.68 Paragraph 20, Part 3 of Schedule 2 of the *National Health Service (Wales) Act 2006* enables a Health Board to purchase land compulsorily for the purposes of its functions subject to confirmation of the Order by the Welsh Ministers.

7.69 No CPO may be made by an NHS Trust or Health Board 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 Welsh Ministers in such form and together with such information as they require, and

(b) has been approved by them.

7.70 The prior approval of the Health Secretary must be sought before the NHS Trust or Health Board proceeds with making a CPO. A robust business case giving a compelling case in the public interest along with full details of why such powers are required should be submitted to Health and Social Services Group as soon as it is envisaged that a CPO is likely to be required.

7.71 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 given by Health and Social Services Group, the NHS Trust or Health Board may begin the CPO process, which will have to be submitted to, and confirmed by, the Welsh Ministers.

7.72 An NHS Trust or Health Board could use the aforementioned powers (see **paragraphs 7.66 -7.76**) to purchase land compulsorily for the purposes of its functions where a third-party developer is to be used to provide the healthcare facilities.

7.73 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.

7.74 Once a CPO has been made, the NHS Trust or Health Board is not committed to actually acquire the land included within the Order, but has a 3-year period from confirmation of the CPO to serve a notice to acquire the relevant land. After serving the notice, the NHS Trust or Health Board 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.

7.75 The Crichel Down rules (see **paragraphs 4.22 – 4.31**) do not apply where an NHS organisation 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.

7.76 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.

Chapter 8

Acquisition of leasehold land and property

Introduction

8.1 This chapter deals with acquisitions by NHS organisations of leasehold land and property. Many of the provisions for freehold acquisitions apply to leasehold acquisitions. In addition, sustainability should be a consideration for the acquisition of this type of property (see **paragraphs 2.94 - 2.98** for details).

8.2 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

8.3 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

8.4 NHS organisations should check their delegated limits before proceeding with leasing arrangements (see **paragraphs 1.45 – 1.48** for details).

8.5 All NHS organisations should liaise with and instruct Specialist Estates Services to manage leasehold land and property acquisitions on their behalf.

Principles of leasing

8.6 An NHS organisation may enter into a leasehold agreement provided it is the best course of action in accordance with the business case. Advice should always be obtained from Specialist Estates Services to ensure that the transaction represents value for money. The financial analysis and commercial terms are important to inform the decision-making process.

8.7 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 NHS organisations should consider the whole lifecycle of leased premises including future planning and exit strategies.

8.8 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 most suitable land and/or property is only available on lease.

The option appraisal

8.9 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.

8.10 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.

8.11 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 information management & technology 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).

8.12 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 Specialist Estates Services in respect of value.

Negotiating the lease

8.13 The strength of an NHS organisations covenant is good and this fact should be used in all negotiations to good benefit.

8.14 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.

It should be noted that all the aforementioned factors will affect the rent payable.

8.15 The following factors should be considered when negotiating the lease:

Lease term

8.16 Lease terms in excess of 5 years should not be entered into unless there are sound reasons for a lengthier commitment justified in the business case. This could be where there is a definite long-term need for the premises and a longer lease commitment would generate significantly greater incentives or where a longer lease is a commercial necessity e.g. the preferred option is a new build which is not financially viable without a longer lease commitment.

8.17 Should a longer lease be considered it is important that funding is secured for the length of the lease and that all stakeholders are agreed to the longer-term commitment. In addition, appropriate break clauses and assignment provisions should be carefully considered as well as ensuring that the user clause is not overly restrictive.

8.18 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) (see **paragraphs 5.6 – 5.16**).

Rent reviews

8.19 Rent reviews are the periodic adjustment of rents to the market level at the date of the review.

8.20 Upwards-only rent reviews should be avoided wherever possible.

8.21 Reviews should ideally be no more frequent than every five years.

8.22 For any reviews not based on the open market rent (such as RPI or CPI linked rental increases), NHS organisations should seek advice from Specialist Estates Services especially where commercial landlords may be unwilling to agree to upward and downward rent review provisions.

8.23 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.

Acquisition of leasehold land and property

Break clauses

8.24 A break clause is a provision in a lease which allows either the landlord or the tenant to end the lease early. Legal advice should be taken at an early stage to ensure that all break provisions are complied with as failure to do so may invalidate the break.

8.25 Break clauses can be at regular intervals (for example every five years) or rolling, or at service contract end dates. Preferably they will be capable of exercise only by the NHS organisation (as tenant), although commercial negotiation with the landlord may be necessary.

8.26 If the break clause is to be capable of exercise by either party, then the NHS organisation (as 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.

8.27 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.

8.28 It may be useful to negotiate a break clause after each rent review to guard against substantial or excessive rent increases.

8.29 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.

8.30 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 principal rent and not any other sum (whether reserved as rent or not).

8.31 Many break clauses require the rent to have been paid in full up until the next rent payment date, which is often beyond the break date. The break provisions should incorporate a clause to ensure that any overpayment of rent beyond the break date is capable of being recovered by the tenant.

User provisions and other specified user restrictions

8.32 Overly restrictive user clauses should be avoided, particularly where longer-term leases are being considered, as this may prevent the lease from being assigned (see **paragraphs 5.6 – 5.16** for details of assignment).

8.33 If the use is restricted, 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.

8.34 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

8.35 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. 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.

8.36 The lease should permit sub-letting of the whole building and, where the building allows, sub-letting of part or parts of the leased area.

8.37 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.

8.38 On assignment, the liability of the original landlord and tenant to a lease may vary depending on whether the lease was granted before or after the 1 January 1996. See **paragraphs 5.6 – 5.16** for a more detailed explanation.

Freedom to make alterations and adaptations

8.39 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.

8.40 Tenants should ensure they have the right to erect demountable non-structural partitioning without the need to obtain the landlord's consent.

8.41 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.

8.42 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.

8.43 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 and is retained with the lease documents.

Repairing obligations and separate service charges

8.44 As a tenant, the NHS organisation should ideally seek to be responsible for internal repairs only, although this may be resisted by the landlord where the entire building is being demised.

8 Acquisition of leasehold land and property

8.45 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.

8.46 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.

8.47 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.

8.48 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.

8.49 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.

8.50 NHS organisations should insist that the landlord complies with the code of practice on '*Service charges in commercial property' (RICS, 2014)* (see **paragraphs 2.31 – 2.33**).

8.51 NHS organisations should ensure that the method of apportionment of such costs between the tenants is fair.

8.52 NHS organisations could, additionally, 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.

8.53 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 7.27 – 7.31**) should highlight such costs.

8.54 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.

8.55 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.

8.56 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

8.57 In appropriate circumstances, NHS organisations may seek landlord's approval to self-insure under the Welsh Risk Pool scheme (see **paragraphs 2.88 – 2.93**).

8.58 If, as a tenant, the NHS organisation is to effect public liability insurance, the lease should allow it to insure under the Welsh Risk Pool scheme.

VAT liability

8.59 It is important to ascertain at the earliest opportunity whether the landlord proposes to charge VAT on rent, by electing to waive exemption.

8.60 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

8.61 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.

8.62 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.

8.63 When agreeing contracts for the acquisition and disposal of both freehold and leasehold land and/or property, NHS organisations should seek to incorporate clearly worded dispute resolution clauses which will assist in resolving any disputes fairly, swiftly and at least cost. See **paragraphs 4.192 - 4.194** for more detailed information.

Notices

8.64 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

8.65 Each NHS organisation should carefully check its standing financial instructions and its standing orders to ensure that it is correctly signing or sealing leases.

8.66 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 Specialist Estates Services and the solicitor.

Post-completion

8.67 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.

8.68 The legal adviser 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.

8.69 Once a lease has been entered into, the NHS organisation must ensure that its terms and conditions are complied with.

8.70 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 NHS organisations actively manage lease portfolios and there is an agreed strategy for lease renewals with enough time to negotiate a favourable position or to relocate.

8.71 NHS organisations should be proactive in any renewal negotiations in order to protect their interests and strengthen their position. Specialist Estates Services should advise on the appropriate action to be taken.

8.72 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.

8.73 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).

8.74 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.

8.75 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.

8.76 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.

8.77 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 Specialist Estates Services and its legal adviser at the earliest opportunity to ensure that the correct procedures are followed to protect its right to a new lease.

Welsh Language

8.78 Pursuant to the *Landlord and Tenant Act 1954, Part II (Notices)(Wales)(Amendment) Regulations 2005 notices under the 1954 Act* can be written in English and Welsh. Care should be taken to follow the notes to prescribed forms since in certain cases the English Language needs to be used in parts of Welsh Language forms.

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Charities Act 2011
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http://www.legislation.gov.uk/all?title=Law%20of%20property%20Act%201925

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http://www.legislation.gov.uk/wsi/2003/148/contents/made

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http://www.legislation.gov.uk/ukpga/1990/19/contents

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http://www.legislation.gov.uk/uksi/1974/330/contents/made

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Intranet: **http://howis.wales.nhs.uk/ses**
Internet: **http://www.wales.nhs.uk/ses**

Welsh Health Technical Memoranda (WHTMs)

HTM 07-02:2015 *EnCO$_2$de - Making energy work in healthcare*

HTM 07-04:2012 *Water management and water efficiency*

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