



## IT'S THE LAW:

# National Health Service / National Housing Shortage Disposing of Surplus NHS Land

The Conservative Government regularly emphasises the importance, as they see it, of receipts from the disposal of surplus NHS land as a key capital funding stream for the NHS. They estimate surplus NHS land valued at around £3.3bn will be available for disposal in the near future.

### Ownership

Broadly speaking, ownership of the NHS Estate is divided amongst two categories of landowner. The first comprises NHS Trusts (including Foundation Trusts). There are over 200 of them in England. Along with other NHS bodies, they are primarily responsible for the provision of health and care services. But they also have very substantial property portfolios. That land is mostly needed to operate a world class health service. But, as requirements change, some of it becomes surplus to requirements.

The second category of owner is a category of one. It's NHS Property Services Limited. NHSPS was created in 2012 to take central ownership and management of NHS land that was owned by various bodies that have now been abolished. NHSPS own almost 12% of the total NHS Estate. Their remit includes strategic estates planning, asset management and acting as landlord where care providers operate out of premises owned by NHSPS. Again, the land they own is principally still required to operate the NHS. But, again, an increasing proportion of it is seen as surplus to current requirements.

### Informality

Our experience is that where multiple NHS entities are interested in the same land (for example where NHSPS owns the freehold but an NHS Trust is operating a clinic there) the precise property arrangements are often informal and somewhat vague. Sometimes little is documented and the different stakeholders involved have different

understandings (or no understanding) as to the basis of occupation. When acquiring such land it is important to establish whether such arrangements exist and, if so, ensure that they are properly documented (or brought to an end) so that you know, with certainty, that they won't adversely impact your post acquisition proposals.

### Nailing it?

In March 2017, Sir Robert Naylor issued an independent review of the NHS Estate (the Naylor Review), looking at developing a new NHS 'estates strategy' to support the Government's target of releasing surplus NHS land generating cash receipts for reinvestment in the health service and delivering land for 26,000 new homes. The Naylor Review made a number of recommendations as to how the NHS Estate could be reformed to meet the Government's objectives. The Government's response, which was published at the beginning of 2018, included the following announcements:

- An NHS Property Board has now been set up to provide leadership, expertise and support to local NHS organisations on property matters. The Property Board will be responsible for producing guidance on estates planning and disposals, as well as advising on models for affordable housing for NHS staff and partnerships with housing associations and developers.
- The Government will provide £3.9bn of additional capital by 2022/23, including £2.6bn to support estate transformation plans.
- Local NHS organisations will be incentivised to dispose of surplus land by being allowed to retain receipts from land sales, on the condition that they are reinvested in the NHS Estate.



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- The Government agree that in some areas it will be beneficial for the NHS to use their surplus land to provide housing for their staff and are exploring how best it can support NHS landowners who wish to do this.
- NHS workers may be given first refusal on affordable homes built on land sold out of the NHS Estate.

The Government also heavily promoted the autumn 2017 Budget announcement of a 'further' £3.5 billion of capital investment funding for the NHS (which forms part of the £3.9 billion of funding referred to in the Government's response to the Naylor Review) to assist with estate transformation, being championed as a means to unlock land for residential development. Many of the announcements are not new, some of the funding commitments are recycled, Foundation Trusts can already retain receipts from land sales for local re-investment and first refusal of new affordable housing for NHS workers was first announced in October 2017. However, the policy direction is clear:

- an emphasis on identifying surplus land for sale to finance capital expenditure within the NHS, aided by increased incentives and central support for NHS landowners; and
- a desire to develop surplus land as housing, especially key worker accommodation.

This is therefore a great opportunity for Registered Providers and other developers to partner with local NHS providers, both in terms of developing and providing new housing on surplus land, and in offering their expertise in managing supported care facilities to help improve and run secondary care facilities more efficiently, thus enabling additional surplus land to be found.

### Right of First Refusal

The Government believes that giving NHS workers first refusal on affordable housing built on land sold off from the NHS Estate will benefit up to 3,000 families and deliver operational benefits to the NHS.

We need further details on how this policy will work in practice, for instance whether legislation will be passed requiring planning authorities to consider incorporating this requirement when granting planning permission, or whether the NHS will seek to impose the requirement as part of the land sale process (for instance through restrictive covenants).

However the policy is implemented, Registered Providers will need to ensure that any new requirements imposed are compatible with the terms of the relevant planning permission, section 106 agreement and any local authority nomination requirements (whether site specific or borough-wide agreements).

Developers will also need to consider how the obligations relating to the right of first refusal can be built into their marketing strategies for any shared ownership units. Some commentators have suggested that, even at 'affordable levels', new homes built on surplus NHS land may be unaffordable to many NHS staff, whose real wage income has seen a sharp fall over the

last 7 years. If it transpires that the ability for eligible workers to actually take up the new affordable housing offered is low, the first refusal policy would give little practical benefit but developers may suffer delays in achieving sales whilst complying with the policy. The issue will also be relevant for other affordable housing tenures, where the need to keep voids to a minimum needs to be balanced against the benefit of first offering new affordable housing to NHS staff. Key to this will be understanding precisely what the government means by 'first refusal'.

### The highest bidder?

Currently, the disposal of surplus land by Trusts is governed by the NHS Estate Code, which imposes an obligation to obtain the best price reasonably obtainable. There are exceptions to this obligation, including in circumstances where the disposal would achieve operational and/ or wider public benefits beyond price considerations alone. Where the disposal of surplus land would achieve wider public or operational benefits, the NHS Estate Code allows a monetary value to be ascribed to such benefits in determining whether an offer is the best price reasonably obtainable.

The NHS Estate Code does not set rules on specific levels of affordable housing provision that must be included in any development proposal for surplus land and the Government's response to the Naylor Review noted that most local authorities already have policies in place to ensure that affordable housing is delivered on new residential developments. However, given the Government's emphasis on incorporating affordable housing for NHS staff into redeveloped surplus land in recent policy announcements, we expect that the NHS will be encouraged to take such factors into account when inviting bids for surplus land. Indeed, it may even be the case that any development proposal that does not fully promote affordable housing provision may be perceived in an unfavourable light.

It is still uncertain precisely how the competing objectives of the duty to obtain best value in monetary terms and the need to provide enhanced levels of affordable housing for key workers will be balanced. Attention should be given to any guidance issued by the NHS Property Board in the coming months that might shed light on this issue. However, in the meantime, when presenting their bids developers should consider how and to what extent they can ascribe a monetary value to commitments to provide key worker affordable housing to ensure they are seen in a favourable light when assessing 'best value'.

### The tiny print

This is one of a series of leaflets published by Devonshires' Real Estate & Projects Department aimed at our property owning clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

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