

Fees on Transfer of Title, Change of Occupancy and Other Events

Response to Law Commission Consultation

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Section 1: Introduction and legal considerations

Elderly Accommodation Counsel (EAC) has worked closely with the Commission throughout its consultation, by our involvement on the advisory panel and the provision of data on leasehold retirement housing across England and Wales. Recently we have also jointly hosted an event to publicise the purpose of the consultation and encourage responses from industry leaders and representatives.

EAC believes that in order to maintain momentum around the appetite for change that there appears to be amongst residents and providers, the Department for Communities and Local Government should approve the event fee provisions, suggested by EAC within this consultation response. under section 87 of the Leasehold Reform, Housing and Urban Development Act 1993 as these reforms appear to be covered by subsection 1:

(1)The Secretary of State may, if he considers it appropriate to do so, by order—

(a) approve any code of practice—

(i)which appears to him to be designed to promote desirable practices in relation to any matter or matters directly or indirectly concerned with the management of residential property by relevant persons; and

(ii)which has been submitted to him for his approval;

We feel that this approval would help the reforms to be introduced quickly without requiring primary legislation, which is likely to be lengthy and more difficult to achieve.

However, we agree with the Commission that statutory reform of the law is needed to ensure that event fees are fully assessable for fairness under the unfair terms legislation, as set out in the Consumer Rights Act 2015. In addition, it seems reasonable that any event fee should be considered a contractual term between the landlord and tenant from the date of agreement. In order for the reforms to be realistic and feasible, EAC would agree with the Commission that these changes should apply on the next sale of lease, rather than to contracts held by existing leaseholders.

With regards to the proposed addition to the 'Grey List' for event fees, it seems reasonable that any such lease terms, which are considered in breach of the proposals and are therefore an unfair contract term, should be included on the 'grey list' of unfair terms.

Where an event fee, which complies with provisions, is used, EAC believe that it should be held in a statutory trust in instances where it is held as a sinking fund for

the purpose of maintenance, repairs or improvements (as per section 42 of the Landlord and Tenant Act 1987).

Section 2: Definition, existing codes of practice and sponsorship

We agree with the Commission's definition of event fees as being a defined event where:

- A. the event is that title to the lease changes hands, a change in the occupancy of the property; or some other event which creates a third party interest in the lease; and
- B. the fee is fixed or calculated in accordance with a formula.

Whilst EAC would like the proposed rules regarding transparency to extend to all fees and charges associated with retirement leasehold properties, we understand that was not within the remit set by the Department for Communities and Local Government (DCLG). Despite this, we would agree that the definition of event fees should not include fees which:

fall within the definition of administration charges in schedule 11 to the Commonhold and Leasehold Reform Act 2002

must be used exclusively for the maintenance, repair or improvement of the development and which are subject to the proposed statutory trust

It is the opinion of EAC that the codes of practice relating to developers, operators, managing agents and estate agents, must be strengthened to ensure that event fees are brought to the attention of purchasers at an early stage. This is a vital part of the proposed changes as without this duty the intention to make event fees transparent will fail. The consultation acknowledges that it is important potential purchasers are aware of the costs associated with certain changes in circumstances before they become attached to the property and are 'picking out the curtains' (section 2.25 and 4.45).

In order to ensure that any reforms are adhered to by providers and agents, it is important that there is suitable 'policing' in place. **Any new rules relating to the transparency of event fees must be enforceable by an independent organisation that is able to act impartially without being influenced by the impact on any of its stakeholders.** As an example to highlight the difficulties that trade bodies have in enforcing their codes of practice, The Property Ombudsman's Annual Report shows that they received 16,792 complaint enquiries with only 3,115 being 'considered, reviewed and resolved' and of those lettings disputes that were resolved, 54% were brought forward by landlords, compared to 44% from tenants. Whilst we acknowledge that Ombudsman services do act independently, they do

appear to encounter difficulties when striking a balance between maintaining a good working relationship with their stakeholders and policing any breach in practice made by them.

We believe that whilst requiring transparency surrounding event fees within a code of practice is a positive step, by itself it is unlikely to significantly increase consumer confidence in the retirement housing market as there will inevitably be instances of non-compliance and gaps in understanding. To achieve this, we strongly recommend that, in the interests of consumer confidence and reputation of the sector, consideration is given to establishing a fully independent ombudsman /organisation for the leasehold retirement sector which is neither reliant on, nor run by, the sector itself.

However, with that said, we would encourage the Commission to fully engage and establish a dialogue with trade bodies which have existing codes of practice and which would be expected to help implement any reforms. Such organisations include the Association of Retirement Housing Managers (ARHM), Associated Retirement Community Operators (ARCO) and the National Association of Estate Agents (NAEA). Whilst they may not themselves be completely separated from the pressure of their members, they may be able to assist the Commission in identifying difficulties that they have encountered when enforcing their code of practice, to help ensure that any mechanisms devised to deliver transparency in event fees are designed to address these as far as is possible.

Finally, on the issue of effective enforcement, there appears to be a current 'gap' in The Property Ombudsman's ability to offer redress to consumers who have a complaint against an estate agency which is no longer trading. We are keen to bring this issue to the attention of the Commission so that it can be considered when deciding upon the nature and scope of any enforcement body.

Section 3: The application of event fees

With regards to event fees that apply to sub-letting we would agree with the Commission that it is disproportionate to charge a percentage of the market value of the property when the leaseholder wishes to sublet. **The view of EAC is that each landlord or managing agent should set a flat administrative fee for all leaseholders, and this should be made clear to perspective purchasers.**

Whilst we have considered various different funding formulae that would give clarity whilst also allowing for annual increases to reflect interest, we have not identified one in particular that would achieve our aims of a justifiable, defensible and transparent flat fee for subletting. We would encourage the Commission to work with the industry to discuss payment structures that would achieve these aims.

As an advice service for older people and their families, EAC FirstStop's advisors have encountered a number of instances where family have inherited a leasehold retirement property and have chosen to sublet it due to an inactive market for retirement housing in the area and high service charges. This has led to them being 'hit twice' with a percentage of the sale fee being charged to sublet and then again when the property is eventually sold. It would therefore seem that a flat administrative charge for sub-letting would limit costs to the older person or their estate whilst also potentially encouraging more people to let their retirement home out whilst they are up for sale.

EAC would agree with the Commission that event fees should only be applied where a property is sold or sublet.

The option to pay for fees upfront is an important one for potential purchasers and EAC would like to see the ability to pay for their event fee 'up-front' in all leasehold retirement purchases that have such a fee payable. Whilst we do appreciate that many older people prefer to 'defer' the payment of the event fee until their homes are sold, the option to pay up front and ensure that beneficiaries are not hit by additional costs is one that we believe must be offered by retirement housing schemes with event fees.

EAC and FirstStop Advice are committed to offering accommodation options to older people and their families and we believe that having the choice to pay the money up front would help to accomplish the following:

- Increased confidence through having a greater choice and therefore an enhanced level of control over the purchase of a future home.
- A greater understanding of what an event fees is and why deferring it is a valid option. If purchasers have the option to pay significantly more at the start then they are more likely to take the time to understand more about what they are paying for/deferring.
- For some developers, who also act as managers, it may provide them with an instant income. For smaller developers, having an 'up-front' purchase option may be an attractive option to put to clients.

Prior to a purchaser making a decision on whether to pay 'up-front' or defer the event fee, it is our recommendation that potential leaseholders should be provided with a 'key facts' document, similar to that which a mortgage provider is required to show, which clearly sets out the costs that leaseholders are expected to pay upon selling or sub-letting their property. Worked examples for various re-sale prices will be the most useful tool here in helping purchasers to put a figure on their future liability for event fees.

If up-front payment of event fees is to be offered to potential leaseholders then it is important that developers and managing agents do not deliberately make one option considerably less appealing than the other. It therefore seems necessary to have a

set of payment structures which all providers must use when determining the cost of the up-front option.

Setting a clear guideline on how 'up-front' event fees should be calculated is complicated as there are a number of factors which can have a significant impact on the re-sale value of a property:

1. The classification of a scheme (e.g.: Extra Care)
2. The time remaining on the lease at the point of re-sale
3. Regional differences in the strength of the retirement housing market

We have considered different methods by which up-front event fees might be calculated by developers and managing agents, but have so far not identified a formula that we would like to present to the Commission. However, we would suggest that there appear to be three main options:

- A deferred charge (similar to the current exit/transfer fees)
- 'Pay as you go'. This may be an appealing option to those who do not wish to pay the full fee at the beginning or the end but would rather pay monthly or annually.
- An upfront premium that is paid upon purchase of the property. This could be calculated as a percentage of the purchase price, reflect the annual service charges or be a flat fee on top of the purchase price.

Section 4: Disclosure when a property is sold by the landlord or managing agent

EAC agrees with the Commission that advertisements for leasehold retirement properties for sale must display the event fee within the details of the property listing.

When prospective purchasers arrange to view the property, we are in agreement with the Commission that they should receive a disclosure document at, or before, the viewing. For off-plan properties this should be provided at the first significant interaction with sales staff and the event fee itself should, ideally, be included in any site/sales presentation.

We agree with the Commission that the disclosure document should:

set out in the same place all the event fees applying to the property (including sinking fund fees subject to a statutory trust); and

illustrate their effect, explain alternative options and give contact details for advice organisations

With regards to providing contact details for advice organisations, we will discuss our views on what role information and advice has to play in the education of retirement leasehold properties later in our response. **However, we strongly agree that the disclosure document should encourage prospective purchasers to seek further impartial advice on their housing options.**

We are also in agreement that code should specify how illustrative examples are calculated. In particular it should:

require that the example is based on a price which is fairly representative for that development; and

standardise the intervals and the range of likely house price increases, so that they extend to an adequate number of years (for example, 15 years)

Event fees should also be raised where prospective purchasers engage in face to face discussions with developers, operators, managing agents and estate agents. We believe that in order for the consultation to have its desired effect, of transparency leading to increased consumer confidence, that there needs to be a shift in the mentality regarding the sale of retirement housing, especially where this is done by estate agents who are not familiar with the industry. Therefore working with organisations such as the NAEA is important in order to ensure that agents are familiar with what is required of them and understand where to go and who to contact in order to get further information on the process, if necessary.

We are in agreement with the Commission that:

Where a property with an event fee is sold through managing agents, the managing agent should:

- (1) comply with requirements on advertising,
- (2) supply copies of the disclosure document at an early stage;
and
- (3) hold face-to-face discussions with prospective purchasers

However, we would be more specific than the disclosure document just being made available at an “early stage”. We have specified above that this should happen at the point of arranging to view a retirement property; we would also add that this document should be available when details are sent to prospective purchasers as part of printed or electronic sale literature.

Section 5: The sale of property through an estate agent and the importance of a national database of event fees

With regards specifically to estate agents, it is reasonable that the codes which apply to them (such as The Property Ombudsman code for NAEA members) should be updated to reflect the principles of transparency that have already been discussed for managing agents. This includes requiring them to mention the event fee in any advertisement and to provide a full disclosure document before, or at, a viewing.

When selling specialist housing, we would like to see estate agents encouraging potential purchasers to have a discussion with the on-site manager responsible for the property. Not only will this give them an opportunity to raise any questions that they may have surrounding fees and charges, but it is a vital in determining whether or not a person wishes to purchase the property – our FirstStop advice service regularly advises clients that the quality of the scheme manager can make, or break, a scheme.

In our response so far we have highlighted the need for information about event fees to be transparent and accessible to prospective purchasers at the earliest possible stage. It is the view of EAC that one of the simplest and most effective ways of accomplishing this is to hold up-to-date details of event fees on an online retirement housing database for England and Wales which is accessible to managing agents and estate agents, as well as the public.

The alternative option of estate agents being able to contact managing agents for this information will almost certainly result in a delay between potential purchasers expressing an interest and being provided with the details about the associated costs, by which point they may have already become emotionally attached to what they consider to be their new home. It is our opinion that this option would not noticeably increase the transparency surrounding event fees.

We would also like to flag that in our view, a well presented online database, even one which allows for comparisons and provides other general information about each retirement housing scheme, would be unlikely to satisfy all users, whether public or professional. If the aim is both to inform individual users and build confidence in the market, then consideration needs to be given to whether some form of independent, impartial help line service would be necessary. From the experience of our own advice line we can see the following key benefit to consumers:

- The opportunity to understand key differences between retirement leasehold and general freehold housing
- The understanding that the advice given is impartial and will therefore put the consumer first
- Trained advisors may be able to identify instances where other services may help to increase independence and/or wellbeing (such as adaptations, home improvements or assistive technology)

- The ability for the advisor to interact with a national database of housing and event fees would ensure that those without an internet connection can still benefit from this resource
- Advisors may also be able to identify financial entitlements and/or recommend that clients speak to an Independent Financial Advisor to ensure that any decision taken regarding housing is affordable in the longer term

Section 6: Existing leasehold tenants

Whilst EAC would like to see reform relating to event fees apply to existing leasehold tenants, as well as new tenants, we are unsure how this could be achieved with the support of the industry and without ‘opening the floodgates’ to a possible deluge of legal challenges that may distract from the Commission’s intention to build confidence within the sector.

However we do recommend that the Commission, in its report to Government, flags the importance of further efforts to resolve the legitimate grievances of some existing leaseholders.

Section 7: Conveyancing protocols

Should a prospective purchaser decide to go ahead with buying a leasehold retirement housing property then we would expect conveyancers to talk through event fees contained within the lease with their clients; however we understand that this is common practice already and the Consultation paper in section 4.32 explains that:

Conveyancers are under a duty to inform purchasers of adverse terms. All solicitors in our study said that they did this.

However we also note section 4.30 which states that:

Most solicitors (77%) said that purchasers only found out about transfer fees when they were told about them by their conveyancer.

Whilst we hope that the Commission will recommend that estate agents have to disclose information concerning the event fee during advertising and at the point of first contact, it seems important that the conveyancers continue to identify and highlight event fees to their clients. **We would therefore suggest that event fees are clearly defined as an adverse term and that legal documentation, supplied by the agents to the purchaser’s solicitor, include details of the event fees.**

Section 8: Rejecting an outright ban

We do not feel that we, and perhaps other respondents to this consultation, have sufficient knowledge or understanding of the likely impact of an outright ban on event fees. But taking a broad view, we do feel that housing providers in this country have to date been surprisingly uncreative in exploring alternative models of charging for those services which are integral to leasehold retirement and extra care housing.

We therefore suggest that regardless of the reforms that may result from this consultation, Government should support, and if necessary initiate, an investigation into alternative financial models for developing and running leasehold retirement housing, including alternative ways in which consumers could pay for it. We believe that this investigation must be endorsed by Government in order to ensure that it is thorough and that it ultimately provides consumers with the greatest possible range of options for purchasing a retirement leasehold property and paying for the associated services.

Section 9: Effect on consumer confidence

We do agree that the Commission's proposals are likely to improve consumer confidence in the specialist housing market. However, the extent of this improvement, and the speed at which it happens, will, we believe, be much greater if clear information about event fees is part of a package that provides sufficient other information about individual properties, developments and their management to enable consumers to fully understand and compare competing retirement housing products, and decide which will best meet their needs and aspirations at a cost that is affordable and feels fair and reasonable.

Few potential purchasers can be unaware of and uninfluenced by the regular, unfavourable press and media coverage the market attracts, much of this focused on event fees. A bad press over many years has clearly tarnished the industry's reputation and sapped consumer confidence. The Commission's proposals should help to restore some level of confidence.

However in our experience there are a number of reasons why potential customers are wary of retirement housing, including the fact that leasehold tenure is unfamiliar to most home owning households, and that the retirement 'housing' product is actually a hybrid combination of bricks & mortar and services. The tenure and the hybrid nature of retirement housing mean that from a financial and budgeting perspective, so important to many older households, it poses considerable challenges. Alongside the purchase price are a number of ongoing charges that deter many people, not necessarily because they would be unaffordable initially, but because of a sense that they are beyond their control. Event fees are therefore just part of the challenge that households face in appraising whether leasehold

retirement housing is right for them and whether the 'all-in' price is fair, reasonable and affordable.

And of course for many older people this understandable wariness about retirement housing plays into a more general resistance to moving home at all. The complexity of housing decision making in older age is well researched and documented.

We therefore believe that for maximum impact on consumer confidence the Commission's very welcome recommendations on introducing much greater transparency around event fees should be a building block in a more comprehensive information service around leasehold retirement housing, and backed by a knowledgeable, sensitive, independent and broader 'housing options' advisory service committed to helping older households understand and appraise the various options open to them to secure a home in which they can live safely, well, independently and affordably into later life.

A key question is whether increased consumer confidence will lead to market growth and diversification. On this we offer some thoughts, rather than hard evidence. We know from our tracking of the retirement housing market that the current supply of leasehold retirement housing is very low, whether measured in terms of how many older households in England and Wales live in it (2%), how this compares with other countries such as Australia (13%) and the United States (17%), and also by comparison with the social rented sector (7%).

We also know from interactions with our website visitors and Advice Line clients, and from our consultations with thousands of retirement housing residents, that specialist later life housing, of all forms, holds considerable attractions for far more people than actually move into it. Yet we also know that for those people who do make the move, retirement housing generally delivers the benefits they sought. We understand some of the reasons why potential demand does not translate into effective demand (as above), but not enough.

Our considered opinion is that the comprehensive 'housing options' information and advice service proposed above, properly structured, could also deliver large scale evidence and insights into older people as housing consumers, enabling existing providers and new market entrants to understand and respond better to consumer demand.

[See our response to Q27 for our further thoughts on incorporating information about event fees into a retirement housing database and a comprehensive housing options advice service]

Section 10: Establishing a national database of event fees

At Question 15, 16 above, we highlighted the need for information about event fees to be transparent and accessible to prospective purchasers at an early stage, and said that in our view the simplest and most effective way of accomplishing this is to hold up-to-date details of event fees on an online retirement housing database for

England and Wales which is accessible to managing agents and estate agents, as well as the public.

From our experience in this sector, we envisage that the bulk of the cost of developing and maintaining a new online database will be for data collection rather than the web service to deliver it to estate agents and others. There will also be significant up-front costs to design and agree a data structure able to accommodate the various permutations of event fee arrangements.

Data collection costs will depend substantially on the willingness of landlords and/or managing agents to provide the information required in standard format. Despite the support that can be expected from trade bodies, we would anticipate in the early days the need for heavy involvement in 'negotiating' with landlords coupled with hands-on help and support to get the database populated. Our ball-park assessment is that *starting from scratch*, a first year project, to create a substantial database which lists basic event fee details for each scheme, might require:

- A full time **project lead** responsible for brokering relationships with landlords and managers, devising an appropriate data structure, specifying and commissioning an online data capture system, specifying a public website and creating explanatory materials/web pages to accompany the data on event fees, and ultimately promoting the site to all intended users.
- A full time **data officer** responsible for data collection, including checking data inputted online by landlords and managers themselves and receiving data provided on paper or in other forms and inputting this on their behalf.
- Provision for **commissioning website and content management systems**.

An alternative approach would be to expand EAC's HousingCare directory of retirement housing developments to include information on event fees. In terms of speedily implementing the Commission's recommendations, the case for this is twofold:

1. EAC's database already exists, it is the most comprehensive source of information on retirement housing available, and its contents are already freely available on the website www.HousingCare.org. Expanding it to hold information on event fees would be faster and cheaper than developing a new stand-alone database and web platform, and provide a better more integrated service to users;
2. EAC is known and respected within the retirement housing sector, and well versed in collecting, compiling and disseminating information from individual providers.

Although strictly beyond the scope of this consultation, we argued in our response to Question 23 above that, for maximum impact on consumer confidence and market growth, information about event fees should be made available as part of a comprehensive information service around leasehold retirement housing, backed by an independent 'housing options' advisory service. If this approach were adopted by

Government, the industry, or both, then the case for building on EAC's database and its FirstStop Advice services is strengthened further:

- EAC as respected consumer organisation enhancing the perceived integrity and transparency of the retirement housing industry;
- The EAC database is used by FirstStop Advisors, nationally and locally, as a primary source of information during conversations with clients, and also used to generate and distribute development (scheme) profile reports for despatch to them;
- The HousingCare website hosts the database alongside other directories, written materials and tools to provide comprehensive information about all later life housing options;
- The HousingCare site is also the main gateway into the range of EAC FirstStop Advice services, including telephone Advice Line, email, 'live chat' and face-to-face.

In a separate side note to the Commission we have detailed how EAC would propose to create an online database of event fee information and integrate this into its retirement housing directory on the HousingCare website.

In this note we have also attempted to estimate the cost of creating a much more sophisticated 'comparison' website presentation, enabling users to compare developments on cost, charges, fees, key lease clauses and a number of other important factors, so as to fully appraise the pros and cons of each against their own priorities. This would make considerably more demands on the industry, and substantially increase costs. However it would be the gold standard.

We have also included an outline specification for an independent and impartial information & advice service specifically set up for older people considering retirement leasehold accommodation. This is difficult to cost even approximately without piloting because much would depend on client numbers as well as how open-ended the service offer was. The national FirstStop Advice service currently provides a more limited service to around 6,000 people a year who are considering purchasing a leasehold retirement property, but stronger marketing on the HousingCare website could, we estimate, easily double this number. Promotion of the service by housing developers and estate agents would further increase numbers. We have suggested that a 12 month pilot service could be run by one dedicated Advisor and help establish the scale and scope of service required.

Finally, we have emphasised the challenges associated with each of these options and some of the issues to be addressed. There would be a need for intensive and detailed consultation with the industry to refine our proposals and ensure that they are both workable and acceptable. Examples of issues that have already been raised in our discussions with key players include:

- How frequently will information be updated and whose responsibility is it to keep it up to date?

- We abolished exit fees on new leases some years ago; would we be expected to contribute to the cost of an event fee database?
- How to ensure that the website “compares apples with apples” in terms of services provided and fees charged?
- Managers responsible for older developments with multiple landlords may find it difficult and time consuming to collate details of event fees.
- Many re-sales are handled by high street or online generalist estate agents. How do you propose to police the transparency requirement?
- What can be done to help existing leaseholders?

EAC, 29/01/2016