

THE PRIMARY CARE PREMISES FORUM

SALE & LEASEBACK GUIDANCE FOR GP TENANTS



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Introduction

This Guidance has been prepared by the Primary Care Premises Forum (PCPF) [following full liaison with NHS England and NHS Improvement (NHSE&I), District Valuer Services (DVS) and the BMA]. It is intended to give initial help to guide GPs through the process of a Sale & Leaseback. However, it is not a substitute for any official NHSE&I or BMA guidance or for any proper professional advice and neither the PCPF nor any of the bodies listed above accept any liability.

References

Act: the Landlord & Tenant Act 1954 (Part II);

CMR: the current market rent assessed by DVS on behalf of the NHS to be reimbursed to you following the date of the Rent Review and which will include an allowance for external repairs, buildings insurance and external redecoration;¹

DVS: District Valuer Services appointed by your NHS Funder to determine the CMR and to undertake the VFM Report;

FRI Lease: a full repairing and insuring lease (where the tenant is responsible for the cost of all repairs and maintenance and for the cost of insuring the building);²

Heads of Terms: the key terms to be included within the proposed Lease;

IRI Lease: an internal repairing and insuring lease (where the tenant is responsible for only internal repairs and maintenance and for the cost of the building insurance);

Lease Rent: the rent payable under the terms of your Lease

NHS Funder: the NHS body responsible for the payment of the CMR (which may include NHSE&I or your CCG as the Commissioner of primary care services);

PCD/Directions: NHS (GMS - Premises Cost) Directions 2004, 2013³;

¹ The sum reimbursed is the lower of CMR or the actual Lease Rent (adjusted to TIR terms) and is limited to those parts of the Premises accepted by the NHS Funder as qualifying for inclusion in the CMR assessment.

² Depending upon the terms of your Lease, you will either be liable to undertake the repairs yourselves or alternatively you will be required to meet the Landlord's cost of doing so through the payment of a service charge.

³ This Guidance is based upon the PCD currently available. A further revision of the PCD is anticipated which may impact upon some parts of this Guidance. Your specialist Solicitor and Valuer should be able to advise you on this.

Rent Review: the date specified for the review of the Lease Rent in your Lease;

Solicitor: a specialist solicitor appointed by you who should have good experience in dealing with NHS Healthcare property and who should: (i) comment on the draft Heads of Terms; (ii) negotiate the terms of your Lease upon renewal; and (iii) advise you generally throughout the review/renewal process;

TIR Lease: an internal repairing only lease (where the tenant is responsible for only internal repairs and maintenance, and not for the cost of external repairs and buildings insurance);

Valuer: a specialist Chartered Valuation Surveyor appointed by you who should have good experience in dealing with NHS Healthcare property and who should: (i) negotiate the proposed Lease Rent on your behalf with your Landlord/its Valuer; (ii) liaise with DVS regarding the CMR; (iii) negotiate the Heads of Terms leading to the grant of a new Lease; and (iv) advise you generally throughout the Sale & Leaseback process.

VFM Report: a report under the Directions by DVS to confirm that the Sale & Leaseback is value for money to the NHS.

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A. WHAT IS A SALE & LEASEBACK?

If you are a GP or GP practice currently owning your premises the occasion may arise where you wish to consider a “sale and leaseback”. In simple terms this is where you look to sell the freehold or long leasehold interest to an investor and in return take back a Lease on the premises. This guide has been prepared by the Primary Care Premises Forum in order to give advice to GPs. It should be noted that this is general and initial advice and if a sale and leaseback is to be implemented practices should be properly supported by their solicitor and valuer. The property owning partners and those partners entering into the lease are advised to seek separate representation because of the potential conflict that might arise between securing maximum sale price and the terms of the lease which the prospective Tenant GPs are comfortable with.

B. WHY A SALE & LEASEBACK?

Historically partners would develop and own their surgery premises and when retiring would look to sell on their interest to new incoming partners. The world is however changing and these days many GPs do not want ownership and want to remain flexible as to their location. Thus, rather than ownership and the funding it entails, a Lease where they have the ability to easily assign to continuing partners is often preferable. GPs do not want to end up in a position whereby they are the last one or two owners left owning a building and potentially unable to retire until new GP partners can be found that are ready to buy in. Thus as an alternative to the traditional GP ownership route sale and leaseback could in certain circumstances resolve this situation.

A Lease would impose liability on the tenant partners to pay the rent (which is reimbursed by the NHS under the GP contract) and comply with the lease terms and would require a minimum number of partners (between 2 and 4) to be named on the lease from time to time. Subject to that minimum number of partners being maintained, the lease would in most cases be freely assignable to continuing partners, enabling retiring partners to retire free of liability. If that minimum number cannot be maintained retiring partners may have to act as a guarantor. Further advice on this should be sought from your solicitor.

Premises ownership difficulties is not the only reason for a sale and leaseback and with expanding practices and services together with the new requirements for premises an owner can often find themselves looking at major refurbishment or extension requirements. If the owners cannot get a grant or do not wish to raise the funds a sale and leaseback can be arranged so that not only does the investor buy the freehold but also undertakes the necessary extension improvement works before leasing it back to the practice. Thus, where they are implemented professionally and correctly sale and leasebacks can benefit all parties, but it is essential to follow correct procedures and get the right advice. It is equally essential to ensure that the proposal and new Lease is signed off as “value for money” by NHS England and/or the CCG.

C. WHAT ARE THE PROCEDURES?

The procedures set out below are intended to help ensure you follow the right route and comply with the Sale & Leaseback approval process. It includes ways to improve efficiency and consistency for our NHS commissioning partners and help to expedite the process in England. The NHS procedures and requirements to which you must adhere are set out in full in the Directions where the Sale and Leaseback of premises used for providing primary medical services is regarded as development. The Solicitor and Valuer you engage should already be fully acquainted with these Directions (and with any updates to them).

Stage 1:

The owners (prospective landlords) and the practice partners (prospective tenants) need to discuss and agree each parties' prospective goals. This is best undertaken after initial advice has been received from your Solicitor and Valuer. Initial considerations need to include;

- Which partners will take on the role of the Tenants?
- Do the premises require any repair works?
- Who is responsible and should they be undertaken before or after the lease starts?
- Who will be responsible for ongoing internal and external repairs?
- Do the premises require any improvement works?
- Who will undertake them, and should they be undertaken before or after the lease starts?
- What will be the length of the lease?
- Will it have any break clauses?

It is recommended that initial discussion is commenced with the NHS Funder who may recommend that a surgery inspection be undertaken by them and a schedule of works of improvement and repair, including replacement of old fixtures and fittings, and other improvement works necessary to comply with statutory requirements, agreed with the parties.

All of these elements will clearly affect both the Landlord's and Tenant's immediate and long term responsibilities, plus the rent reimbursement responsibility of the NHS Funder. In a reverse direction they also have a direct effect on the investment value of the property. A longer term (say 25 years) with no breaks and the tenant bearing a full repairing liability increases the Landlord's investment value but reduces the tenants flexibility and increases both the Tenant's and NHS Funder's liability. Rental value is highly likely to increase with the

greater flexibility contained in a lease (notably where short lease terms or lease breaks are included). Inevitably a compromise will have to be found which needs to take full account of the quality and long term suitability of the premises and the aspirations of the practice and PCN. For example, the NHS Funder may accept the higher rent associated with greater flexibility for premises not up to standard or which fall outside to the estates strategy but look to contain rents with longer lease terms for fully compliant premises forming a key strategic role.

Stage 2:

With the guidance of your Solicitor and Valuer draw up draft Heads of Terms to cover the following main points;

- Lease rent (and how does this compare to current Notional Rent being reimbursed).
- Length of lease. This will depend upon the location, age, construction and specification of the surgery. A modern purpose built surgery located in an area which fits with commissioning intentions, and which has benefited from a programme of continued and planned premises improvement and or maintenance, might command a relatively long lease without the need for regular break clauses. A surgery which has dated fixtures and fittings that has not benefitted from investment does not meet statutory compliance or Minimum Standards may only be approved for a shorter lease term which would have an impact on the expected sale price. In such cases a longer term may be considered if a program of improvement work is included in the overall agreement.
- Break clauses
- Tenants repair liability FRI/TIR/IRI. The current Notional Rent will be based on a TIR lease and thus if IRI or FRI the rent will require adjustment.
- If FRI, demonstration of the benefits this option provides and confirmation that a legally protected sinking fund will be established (a percentage of reimbursable rent to be retained by the practice).
- Service charges.
- Alterations. For example, it may be considered appropriate for the tenant to be permitted to undertake internal non-structural alterations without the need to seek landlord consent.
- Application of VAT. Moving from a Notional Rent to a Lease Rent has the potential, should the landlord elect, of incurring VAT. For the NHS to accept this as good value for money full reasoning will be required. An example of such justification would be where major improvement or extension works are proposed by the landlord.
- Alienation (provision for sub-letting and assignment) For example it may be considered appropriate for the tenant to be permitted to share with or sublet part of the

accommodation to other healthcare service providers by a simple means of landlord notification rather than the need for full landlord consent.

- User Clause. The parties should consider the current and potential use of the premises to include medical services under a GP contract plus other healthcare services. Full liaison with the CCG and PCN is recommended to cater for their potential need plus consideration given to not adversely affect the landlord's investment value.
- Rent review provisions (Regularity and mechanisms and confirmation that they adhere to the requirements of the Premises Cost Directions).

Please note that the purpose of this guide is not to provide specific advice and ultimately terms will need to be agreed on a case by case basis with regard to the advice of the Commissioners and DVS.

Stage 3:

Practices submit an 'in principle' application to their NHS Funder, containing a covering letter setting out their reasons for requesting approval and either a summary of headline lease terms proposed or a copy of the draft Heads of Terms. The application should be made on behalf of the GP Partners (the Contractor) with all Partners signing. The letter should include;

- Address of surgery building (second application to be completed for any branch surgeries also being considered)
- Description of type, age and condition of building.
- Does the building meet minimum standards as set out in the Directions (Schedule 1) If not, please state any proposals to bring up to standard.
- Detail any repairs improvements or extensions that will form part of the Sale & Leaseback agreement and when and by whom the work will be undertaken.
- Proposed third party landlord (if known at this stage)
- Confirmation that the practice is taking specialist advice from an independent solicitor and an independent valuer/surveyor.
- Confirmation if the total lease rent is in line with the current Notional Rent. If additional revenue funding is being sought, please state reasons for this request, which will be considered at the discretion of the Commissioners.
- Will the property be registered for VAT and VAT reimbursement on rent sought? The reasoning for VAT election must be explained (for example where major works are proposed). Bear in mind that at a later stage a copy of the VAT election for the property will be required.
- Confirmation that the partnership agreement will be amended to reflect the change in status.
- Confirmation that the application supports NHS Commissioning plans, strategy and future vision of primary care i.e. ensure that there is no conflict with future

redevelopment proposals or relocation of services (any specific estates strategy documents to be referenced)

- Confirmation that the practice feel that the lease term is commensurate to the expected economic life of the building and long-term requirement for GMS services in this location.
- Detail where the proposed transaction offers any specific benefits that support long term service provision from this site. For example, sustainability enhancements, supporting training, partnership succession and recruitment.

Stage 4:

NHS Funder to acknowledge application and respond with an 'in principle' decision, together with any additional criteria and requests for information. It is at this stage that the NHS Funder should confirm if in addition to supporting the Sale & Leaseback any proposed enhancement works will also be supported and funded (subject to the satisfactory completion of a Project Initiation Document (PID) and/or Outline Business Case (OBC)). NHS Commissioners to confirm DVS are to be commissioned to undertake an initial VFM report once the Heads of Terms are agreed between the proposed Landlords and proposed Tenants. Such an early indication will allow the practice to prepare a joint submission to the NHS Funder to pass to DVS.

Stage 5:

Following your Solicitor's and Valuer's advice final Heads of Terms are agreed on a subject to contract basis enabling the practice to submit the full pack of information to the NHS Funder and simultaneously instruct the solicitor to start drafting the lease. Any queries or requests for clarification may be dealt with between the DVS and the practice (or their advisors) directly for efficiency. The full pack of information and Heads of Terms are provided so that the VFM report can be issued subject to final lease approval. This allows any additional recommendations or advice contained in the VFM report to be introduced prior to the lease being fully drafted. The DV submits their VFM report and any recommendations to the NHS Funder, who will consider and form their own views. Any initial areas of concern/required amendments to be addressed with the practice.

Stage 6:

On completion of the above and the alignment of the VFM report and the Heads of Terms the Lease can be engrossed ready for signature. Before signing a copy of the lease DVS will

need to confirm that the lease aligns with the Heads of Terms and that their VFM report remains valid. The final approval can then be granted by the NHS Funder as appropriate, and a formal letter of approval issued to the practice.

D. WHERE THE OWNERS AND PRACTICE DIFFER

The guidance given above assumes that the GP owners of the property and GP partners of the practice are the same. However, this may not be the case and original owning partners could have retired (but not sold their share in the property) and/or new partners may have joined the practice but not bought into ownership of the premises. In such cases it may be prudent for both entities (the GP owners and potential landlords plus the GP partners and potential tenants) to get separate advice. This applies even where some GPs may find themselves on both sides, both as prospective tenant and landlord.

E. NHS COMMISSIONER/FUNDER CONSIDERATIONS.

A Sale & Leaseback is regarded by Directions as a form of development and thus seen by the CCG and NHS England as an opportunity to ensure that premises both now and in the future comply. Compliance will extend from the PCD minimum standards to the Estates Strategy of the PCN/STP. The Commissioner will have regard to three key factors when assessing the application:

- The condition of the building and remaining economic life;
- Commissioning plans, strategy and future vision of primary care;
- Strategic estates planning and future estates developments;

A surgery inspection should be undertaken by the NHS and a schedule of works of improvement and repair, including replacement of old fixtures and fittings, and other improvement works necessary to comply with statutory requirements may be required.

For this reason, full liaison with your CCG and PCN is recommended at an early stage.

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of the Primary Care Premises Forum**

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