



Section 9 is dead – Long live Section 172?

BRIEFING

Overview

Registered Providers of social housing (and their predecessors - Registered Social Landlords) have for many years been subject to a statutory requirement to obtain the consent of their regulator, the Tenant Services Authority (TSA), for disposing of land. These consents were commonly known as “section 9 consents”.

On 1st April 2010 Registered Providers become subject to a new consents regime for disposals. Although this largely replicates the old section 9 regime, there are a number of important changes.

Need to know in brief

The main features are as follows:

- Only disposals of dwellings – not land – need TSA consent
- Affected dwellings are social housing dwellings, legacy housing and former dwellings
- Granting assured tenancies and disposals under the Right to Buy/Right to Acquire continue to be exempt disposals
- A replacement General Consent applies as previously for many other common types of disposals

- Subject to selection by the TSA, Registered Providers can benefit from a new category under the General Consent for the granting of charges to private lenders

Some definitions

Social housing dwellings are low cost rental and home ownership dwellings. Legacy housing is, subject to limited exceptions, all housing property owned by a Registered Provider on 1st April 2010. Former dwellings means land where on or after 1st April, a social housing dwelling or legacy housing was situated, but has since changed use, or been demolished.

Flexibility and opportunity

This rather more permissive regime is good news for those at Registered Providers concerned with the management and charging of land assets. There will be increased flexibility and reduced bureaucracy, with greater freedom, for example, to dispose of surplus vacant land or commercial property without reference to the TSA.

It also opens up an opportunity. Since new dwellings do not become subject to the disposals regime until their construction is complete, it will be possible to put new developments into charge (under a security trustee arrangement) without the need for consent from the TSA. Although it is likely that funds would not be drawn down until after the homes have been built (and it remains to be seen



what additional requirements lenders may have at this stage), the additional step of satisfying lenders over section 172 requirements will in theory have been removed.

Background

The consents regime under section 9 of the Housing Act 1996 has been replaced by a new regime under section 172 of the Housing and Regeneration Act 2008 (the 2008 Act).

As under the section 9 regime, disposals of property by a Registered Provider will be either:

- Exempt disposals (i.e. no consent is needed, and called 'exceptions' in the 2008 Act) or
- Disposals covered by a new General Consent 2010 issued by the TSA or
- Disposals requiring the TSA's specific consent

The definition of "disposal" is again widely defined and includes sales, leases, mortgages and charges as well as the granting of options requiring a disposal in the future.

So what's new?

The new consents regime has been heralded as being a more permissive and flexible regime. Unlike section 9, which required consent to the disposal of any *land* owned by a registered social landlord, section 172 consent is required only for the disposal of *social housing dwellings*.

For this purpose a dwelling includes any garden, yard or outbuilding belonging to the dwelling, while social housing comprises both low cost rental accommodation and low cost home ownership accommodation. The TSA interprets disposal of a newly constructed dwelling as requiring consent only when the dwelling is capable of being let or sold (usually at practical completion).

So far so good!

Legacy housing

However, as a transitional measure, the 2008 Act designated all properties owned by a Registered Provider immediately before 1 April 2010 as "social housing". The only exceptions are non-grant funded market rented accommodation, student accommodation, registered care homes or asylum seeker Home Office contracted accommodation.

As a result disposals of any dwelling within this "legacy housing" (as the TSA refers to it in its guidance) – even if it is let at market rent – may require consent if it does not fall within any of the exceptions.

Former dwellings

No doubt as a precaution against Registered Providers being tempted to demolish or convert existing dwellings as a method of avoiding section 172 requirements, a provision was included in the 2008 Act requiring consent for disposal of land on which a social housing dwelling (or legacy housing) stood on or after 1 April 2010,



notwithstanding that the dwelling may no longer exist on the land.

Exempt disposals

The 2008 Act states that certain disposals of social housing dwellings are exempt from the requirement for consent. As under the section 9 regime, these include the granting of assured tenancy agreements and shared ownership leases as well as disposals under the Right to Buy/Right to Acquire.

The General Consent 2010

The General Consent 2010 came into effect on 1st April 2010 and sets out 39 categories of disposal. To the extent that it is relevant to disposals of social housing dwellings, all the categories of the previous general consent remain (except for disposal of non-grant funded social housing dwellings of low value) while sales on equity percentage arrangements are added. An overview of two of the most significant changes is set out below.

Charges to private lenders

Of particular note is the availability, in certain circumstances, of the General Consent for disposals by way of charge or mortgage to a private lender (category 6). This will only be possible where the TSA has issued a letter of authorisation for use of this category. Applications for a letter of authorisation are to be made by invitation only and the TSA has stated that unsolicited requests will not hasten the process,

so patience is required! If providers want to see if others have beaten them to it, they will be able to check the list of successful providers to be published on the TSA's website.

In applying for a letter of authorisation, a Registered Provider must give a number of undertakings, including that there will be no on-lending outside the group. Private lenders will, in theory, then be able to rely on a certificate to be given by the Registered Provider that it gave the required undertakings to the TSA and that the conditions of the General Consent have been complied with, although lenders' attitudes to the new arrangements remain to be tested.

Disposals of vacant dwellings out of the sector - approved policy for disposals

Disposals of vacant social housing dwellings out of the social housing sector are permitted under category 5, provided that the disposal is in accordance with a TSA approved policy for disposals. The TSA has warned that it may take them some time to consider applications to agree policies for disposals. Until such policies are approved, then specific consent will be needed.

Some practical issues

The TSA has issued a whole new suite of forms for use under the new consent regime, so you can discard any of the old HACON forms you may have lurking around. Applications for specific consent need to be made on a Form RPCON 1 or 2 while self-certification is done by completing a Form RPCON5.



The Land Registry will continue to place a restriction on the title of all new properties acquired by a Registered Provider regardless of its intended use. However, where no consent is required (for example on a disposal of bare land), the restriction can be satisfied straightforwardly by the issue of a certificate that section 172 does not apply to the disposal. A Registered Provider's authorised officer, or solicitor or licensed conveyancer can certify this.

Finally, don't worry if you are holding onto a Section 9 Consent issued prior to 1st April 2010 in relation to a disposal not yet completed. It will be valid as if given under Section 172 and, if minor

changes are required, some are self-certifiable under the new General Consent.

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