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Real Estate briefing

Mixed use - Commonhold

Commonhold, a special new kind of freehold, was introduced into England and Wales on 27 September 2004. It is similar to the long established strata title in Australia and condominium schemes in the USA.

Commonhold permits freehold ownership of properties sharing common facilities. These types of developments have traditionally been held under long leases because of legal difficulties in enforcing freeholder's obligations to maintain or fund the costs of maintaining shared facilities. Although commonhold is aimed primarily at the multi-tenanted residential sector, it may also be used for commercial and mixed-use developments.

BACK TO BASICS

In any particular commonhold development:

- Owners will have a freehold of a unit in a larger development plus membership of a limited company - the Commonhold Association.
- The freehold interest in the common parts and structure of the development will be vested in the Commonhold Association. This must be a private company limited by guarantee with memorandum and articles of association in a statutorily prescribed form.

- The only members of the Commonhold Association will be the owners of the individual units within the particular development.
- Management of the common parts is conducted by the Commonhold Association so that each unit holder has a democratic right to vote on the general management of the commonhold.
- Unit holders are responsible for the maintenance of their individual units.
- The unit holders and the Commonhold Association are mutually bound to observe the provisions of the Commonhold Community Statement applying to the commonhold.
- The Commonhold Community Statement contains the rules and restrictions applying to the units and common parts of a commonhold. It deals with provisions such as user, repairs, insurance and the commonhold assessment for each unit (similar to a service charge). It must follow a model prescribed form,

with additional tailor-made provisions where appropriate.

COMMONHOLD VERSUS LEASEHOLD

The aim of the new scheme is to provide a viable alternative to long leasehold developments by curing the inherent problems in these schemes. The advantages of commonhold over leasehold schemes are:

- A commonhold unit has a freehold title. Leases are a wasting asset and their value diminishes each year.
- In a commonhold development, the unit holders through the Commonhold Association control the common parts and structure. Leasehold developments may give the landlord an inequitable degree of control.
- All commonhold developments and the individual units in them are subject to the uniform requirements of the Commonhold Community Statement and memorandum and articles of association of the



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Commonhold Association. In a leasehold development there is great potential for inconsistency in drafting between the individual leases.

- Rights to enforce covenants and obligations between tenants in a leasehold development are often problematical, if they exist at all. Special enforcement rights are given to the individual unit holders of a commonhold development.

WHERE IS THE LAW ON COMMONHOLD?

The law on commonhold is contained in Part I of the Commonhold and Leasehold Reform Act 2002. These provisions are supplemented by the Commonhold Regulations 2004 and special Land Registration rules applying to commonhold schemes.

COMMONHOLD IN THE 21ST CENTURY

Commonhold is a purely voluntary scheme. To date, the Land Registry has received no applications for registration of a commonhold development,

supporting initial speculation that take up would be very gradual. At present many in the property industry understandably feel that commonhold is untried and untested.

Overall, commonhold is best suited to residential developments. Certain technical difficulties with the current scheme have been of concern to residential lenders, some of whom have yet to indicate that they will accept a commonhold unit as security. However, depending on market demand it is possible that over time freehold flats will become the norm

Commonhold is not limited to the residential sector and might work well in other areas of the property market, for example retail and warehousing parks. Key issues for commercial developers are that a commonhold does not allow the developer/investor to retain a long-term income stream through a profit sharing headlease nor provide long-term redevelopment potential.

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