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Commonhold Team  
The Law Commission  
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London  
SW1H 9AG

08 March 2019

Dear Mr Jolley and colleagues,

**Consultation Paper: Reinvigorating Commonhold: the alternative to leasehold ownership**

This is an open response from the Association of Leasehold Enfranchisement Practitioners ('ALEP') to the Law Commission's Consultation Paper No.241 on commonhold ('the Consultation').

ALEP welcomes and recognises the work being done by the Law Commission to recommend reforms to the current commonhold system that will make it a viable alternative to leasehold.

ALEP represents practitioners specialising in enfranchisement and as the Law Commission may be aware, ALEP chose Commonhold as its topic for its Spring Lecture in February 2018.

Because ALEP represents practitioners specialising in enfranchisement, we have directed our comments in this open response in the main to areas that touch and concern enfranchisement as these are the areas that are likely to be of most relevance to our members.

ALEP members represent both landlords and tenants, and in presenting the organisation's view it should be borne in mind that ALEP itself is apolitical and represents a wide breadth of members.

We have requested that our members respond directly to the Consultation and we understand that many members of ALEP have submitted direct responses.

ALEP has identified the following areas for comment in relation to commonhold and the proposals set out in the Consultation:

## **1. Conversion to Commonhold**

- 1.1 If the threshold to convert to commonhold is to be reduced to 50% or any figure that represents anything less than a unanimous vote of all property owners and other affected parties with interests (such as mortgagees), then the question of what will happen to existing flat owners with long leases who do not participate will have to be addressed.
- 1.2 The Consultation asks a fundamental question as to whether in such a situation the non-participating owners should be able to retain their leasehold interest within the commonhold (referred to as 'Option 1').
- 1.3 Whilst we accept that in seeking to introduce commonhold, it would be ideal if on conversion all leasehold interests would cease, we cannot see how such a situation would be free from challenge under A1P1 of the ECHR.
- 1.4 In addition, we consider that retaining some 'legacy' leasehold units within the commonhold structure would incentivise those owners, or their successors in title to convert to commonhold in due course.
- 1.5 We are also in favour of the introduction of an individual right (considered in the enfranchisement consultation) to buy into a freehold purchase FMC (or commonhold association) after enfranchisement has taken place. This would also provide a remedy and ensure that in due course (even if not triggered by sale etc.) it would be more likely that a non-participating unit would join the commonhold.
- 1.6 In saying this we recognise the difficulty that would need to be addressed in terms of the commonhold assessment, but we consider that the proposal contained in the Consultation such that the service charge legislation could be disapplied in such circumstances in favour of a right to vote on the commonhold assessment and we consider that this would be the preferred solution in such situations.
- 1.7 Accordingly, we strongly prefer 'Option 1' (as discussed at para 3.69).

## **2. Conversion to commonhold, those funding non-participants and enfranchisement**

- 2.1 If the aim of the enfranchisement consultation (broadly to increase the take up of enfranchisement rights and to make these easier to exercise) is to be

addressed in the commonhold environment then careful consideration needs to be given to the rights of those either from inside or outside the collective of flat owners purchasing their freehold to fund the interests of any flat owner that does not take part in the process.

- 2.3 We see that at paragraph 4.2 the Consultation proposes that the outcome of any enfranchisement process *could* be the creation of a new commonhold. This would be particularly viable if the conversion requirement were the same as the qualifying threshold for enfranchisement rights. However, we are strongly of the view that any proposed output from the enfranchisement process that would result in a commonhold should be very much optional and *not* mandatory.
- 2.4 We say this in part because of the need to consider the likely funding arrangements and the protection of any sums subscribed by any internal or external investor to cover the cost of purchasing the non-participating units.
- 2.5 Currently these interests are protected by a 999 year lease granted as an overriding lease over the non-participating leaseholder's flat. This process has the advantages that it – (a) requires no input from the non-participant and leaves their property interests unaffected and (b). provides adequate security for the interest of the party who has provided the funding.
- 2.6 The overriding lease has a strong advantage as piece of property security and for the reasons discussed at point 4 of this letter below, we consider that any investor's interest is likely to remain best protected this way. If proper consideration is not given as to how to protect the interest of any party who provides additional funding, then this is likely to lead to many fewer people exercising enfranchisement rights.
- 2.7 An additional concern with any mandatory conversion to commonhold would relate to the valuation of the freehold on conversion or as an object of an enfranchisement. If commonhold units, or a commonhold structure has a different market value that a comparable leasehold flat (and clearly during the early years of commonhold there will be something of a parallel market) then it may become very difficult to value the likely losses on reversion to the freeholder and also to anticipate the possible 'marriage value' arising in relation to any non-participating flats.
- 2.8 A particular concern that we have with the 'Option 2' approach - if applied to an enfranchisement scenario - is that a non-participating leaseholder (particularly one with a shorter lease) is likely to have very little incentive to

buy-in to the indebtedness attaching to their unit. Furthermore, we are not certain that the shift in value that would otherwise occur if the non-participating leaseholder does not extend their lease or buy in to the freehold would be as easy to track and or preserve. This is likely to deter investors and potentially reduce the number of enfranchisements.

2.9 We would therefore re-iterate our preference for 'Option 1.'

### **3. Post enfranchisement**

3.1 We understand the proposal at paragraph 4.11 to require the creation of a commonhold association as the output of the enfranchisement process. However, we foresee that the difficulty of handling the equity of participation and the protection of the 'investment' made to deal with non-participants is better protected under the existing system, under which the investor receives a lease – a property interest which is entirely separate from the company's interest in the property and totally secure in the event of the failure or insolvency of the company. We cannot see how this is likely to be attractive to those wishing to (or needing to) fund the 'gap' in an enfranchisement and may therefore not achieve the wider stated objective of encouraging the take up of commonhold.

3.2 We therefore do not consider that having a requirement to create commonhold at the outcome of any enfranchisement process as a mandatory step would (a) be workable and (b) be likely to encourage the take up of enfranchisement rights. Such a position needs to be borne in mind when considering any reduction in the threshold for conversion. We strongly agree with the suggestion at 4.16 that this process should remain optional.

3.3 It seems to us (particularly as the position regarding service charges and other rights for non-participants may be unclear), that this position is either reserved only for collectives with 100% participation or that this is an elective rather than mandatory step when embarking on an enfranchisement. Anything else is likely to lead to fewer enfranchisements.

### **4. Solvency risk and commonhold**

4.1 The Consultation identifies at 7.38 the significant potential disadvantage for participants in a commonhold when compared with a post enfranchisement scenario where the flat owners have 999 year leases at nil rents and a share in the freehold-owning company.

- 3.2 Whilst we accept that commonhold may in principle have the potential to provide a more elegant structure, the current position on insolvency is not clear and we cannot see, unless these issues are fully and properly addressed, how this will be a better alternative to an enfranchised leasehold structure for those with existing titles. As matters stand it would be very difficult for our members to recommend to a post-enfranchisement block (even with 100% participation and 999 year leases at nil rents) that conversion to the current version of commonhold would in any way be better than remaining with their existing leasehold structure.
- 3.3 The consultation makes plain the suggested steps that it envisages would need to be addressed on this point, and we would simply make the point that if the take up of commonhold is to be encouraged then this position will need to be addressed. We consider that there is a very large amount of work to be done in order to address this point in a satisfactory way.
- 3.4 For this reason, we would suggest that the efforts to introduce commonhold are focused initially on new developments and that the proposals concerning insolvency, including successor associations and the amendment of the insolvency rules, together with a specialist liquidator, would need to be adopted to put a commonhold structure in a position where it would represent a recommendable alternative to a comparable leasehold.

If the Law Commission would like to discuss any aspect of this further, then ALEP and the relevant members of its working party will be delighted to enter into further dialogue on these points.

Yours sincerely



Mark Chick  
ALEP Director  
for and on behalf of  
**The Association of Leasehold Enfranchisement Practitioners**