

COMMONHOLD AND LEASEHOLD REFORM ACT 2002

EXPLANATORY NOTES

COMMENTARY ON THE SECTIONS: PART 1

Operation of commonhold

Section 37: Enforcement and compensation

88. *Section 37(1)* gives power to make regulations covering enforcement of rights or duties springing from the commonhold community statement, the memorandum and articles of association of the commonhold association or Part 1 of the Act or any subordinate legislation made under it. *Subsection (2)* lists matters about which the regulations may make provision. The list is not exhaustive. *Subsection (3)* provides that any mention of a provision for the payment of compensation that may be payable under such regulations or under the commonhold community statement should include provision for determining the amount of the compensation and provision for the payment of interest if payment is late. *Subsection (4)* makes it clear that regulations made in relation to commonhold community statement may include regulations under section 32(5)(b).

Section 38: Commonhold assessment

89. *Section 38(1)* requires the commonhold community statement to include provision for the setting of annual budgets (*subsection (1)(a)*) to meet the expenses of the association and to enable the setting of interim budgets (*subsection (1)(b)*) in addition to the annual budget from time to time. It must also specify the percentage of the annual and other estimates which fall to be collected from the unit-holders to be allocated to each unit (*subsection (1)(c)*), ensuring that the total of those percentages shall be 100 (*subsection (2)*) and must require each unit-holder to pay the required amount, to be called the commonhold assessment, in response to a notice or notices which the association must issue (*subsection (1)(e)*). *Subsection (2)(b)* makes it possible to specify a 0% share for a unit. This is chiefly to ensure that, where a commonhold association is the unit-holder, it is not in the anomalous position of having to levy assessments on itself. It will be possible for the commonhold community statement to specify a 0% for *any* unit.

Section 39: Reserve fund

90. *Section 39* provides that regulations made under section 32 may require a commonhold community statement to include provision for the setting up and maintaining of reserve funds for the repair and maintenance of either or both of the common parts (*subsection (1)(a)*) and the units (*subsection (1)(b)*) within the commonhold. *Subsection (2)* provides that, where such fund or funds are set up, the statement must provide for the commonhold association to set a levy from time to time (*subsection (2)(a)*), allocate percentages of the levy to be paid by each unit (*subsection (2)(b)*), again with the requirement that the percentages total 100 (*subsection (3)*), (though also allowing the setting of a 0% share for specified units) requiring the unit

holders to pay (*subsection (2)(c)*) and providing for the issue of notices requiring payment (*subsection (2)(d)*).

91. *Section 39(4)* provides that funds established under this section may not be used in satisfaction of any debt other than a judgement debt arising from an activity which, under the commonhold community statement, could properly be funded from such a fund. Thus, if regular roof replacement is an item to be funded by the reserve fund under a statement, and a roofing contractor has to proceed against the commonhold association, the reserve fund may be used in satisfaction of the debt if a court finds in the contractor's favour. However, if the association is required to pay a substantial excess to its insurer in connection with a claim and the payment of insurance is not a proper call on the reserve fund, the fund cannot be touched by the insurer, even if it is in possession of a judgement, except where the association is insolvent (see definition of reserve fund activity in *subsection (5)(a)*). *Subsection (5)(a)* defines reserve fund activity, (see note to *subsection (4)* above), *subsection (5)(b)* specifies what is meant by assets being used for purposes of debt enforcement, and *subsection (5)(c)* makes it clear that the term judgement debt includes any interest on such a debt.

Section 40: Rectification of documents

92. *Section 40(1)* makes provision for a unit-holder to apply to the court for a declaration that either (a) the memorandum and articles of association of the commonhold association relating to the commonhold association or (b) the commonhold community statement relating to the commonhold association do not comply with the provisions of the Act or regulations made under it. *Subsection (2)* provides that, where the court makes such a declaration, it may make any other order it thinks appropriate, and *subsection (3)* lists a number of matters that might be covered by such an order. These include requiring that the officers of the commonhold association take steps to alter or amend the offending document or take other specified steps, requiring the association to pay compensation and ultimately, ordering that the land cease to be commonhold. *Subsection (4)* sets a time limit for such an application of three months from the date the applicant became a unit-holder, three months from the alleged start of the failure to comply, or, failing these, subject to a time limit or any other permission laid down by the court.

Section 41: Enlargement

93. *Section 41* applies where a commonhold association relating to existing commonhold land votes unanimously and in advance (*subsection (3)*) (and see section 36 as to unanimity) to apply to bring further land into the commonhold to be held as part of their commonhold land and an application under section 2 is submitted to the Registrar (*subsection (1)*). The requirement that all the documents listed in Schedule 1 should be submitted for registration is lifted in relation to this application by *subsection (2)* but consents will be required as set out in paragraph 6 of Schedule 1, as will an application as set out in section 33 to amend the commonhold community statement to take account of the new land. Also to be provided will be a certificate stating, first, that the application satisfies Schedule 2, which specifies which land may not become commonhold land, and second that the vote leading to the application was unanimous.

Section 42: Ombudsman

94. *Section 42* gives the Lord Chancellor power to approve an Ombudsman scheme or schemes as part of the dispute resolution process available to commonhold associations and unit-holders.