

BRIEFING



Q & A's arising from HIPS meeting with DCLG

November 2006

This briefing is based on a series of questions arising from the HBF HIPS meeting with the DCLG on 16 November 06.

Each question is followed by a written response from the DCLG. This document formed the basis of a follow up meeting with DCLG on 12 December 06.

Further information will be supplied as it becomes available.

1.A HIP is required when marketing commences - how is the commencement of 'marketing' defined in relation to new homes?

NB: s.149 Housing Act 2004

"A residential property is put on the market when the fact that it is or may become available for sale is, with the intention of marketing the property, first made public in England and Wales or on behalf of the Seller"

"A fact is made public when it is advertised or otherwise communicated (in whatever form and by whatever means) to the public or section of the public"

Areas for concern:

- Home builders often put signs up prior to building a development either to state that the land has been acquired for building or that a particular number of homes/types will be available for sale. Does this constitute 'marketing' even though the properties may not be available for sale?
- A home could be complete on a development but the home builder may have chosen not to market that home but market other areas/units of the development. How do you distinguish between marketing a development and marketing an individual home?
- If first point of marketing is too early, title to the property may still be in the process of first registration or registration may not have been completed.
- Is reservation deemed off the market? Or is it only off the market when it is sold?

HBF Suggestion:

First point of marketing should be when a home builder releases for sale a particular home (plot) within a development at a specified price. This is a clearly identifiable part

of the marketing process relating to a particular property a prospective purchaser can buy.

DCLG Comments – There is currently no scope to alter the provisions of the Housing Act 2004. However, the HIP duties apply when a “residential property” (defined as a “single dwelling-house” in section 148(1)) is put “on the market” or action is taken which “makes public the fact that the property is on the market”. The wording of section 149 makes it clear that marketing in this context involves the intention to sell a residential property to the public or a section of the public.

The question of whether marketing has begun will depend on the facts of the individual case. If there were any complaint about the actions of a home builder or developer in relation to HIPs, it would be up to the enforcement authorities and ultimately the courts to interpret the legislation with regard to the specific situation.

In relation to what constitutes a communication that “the property is or may become available for sale”, our view is that in cases where a “land acquired for building” sign is erected, there is no single residential property identifiable, and the developer does not know what specifically is for sale, then this is unlikely to be marketing of “the” property. If, however, the developer is at a point at which reservations can be taken for individual properties, then it is likely that the developer is marketing individual properties.

The important point is that the information in a HIP is designed to help buyers to make decisions about properties. If the developer is at a point where people can start doing this, then a HIP is likely to be needed.

If a particular dwelling on a development is not for sale there is no duty to have a Pack. As stated above, the question of whether a property is being marketed for sale would be a matter of judgement or fact. However, in cases where marketing material covers a complete development a statement to the effect that some dwellings are not up for sale should be sufficient to remove any ambiguity in our view.

If the property is in the process of first registration or registration has not yet been completed, title information about the estate which does exist (i.e. the land on which it is situated) would need to be included instead as it would form part of another registered or unregistered estate (see regulation 8(c) and (d) of the Home Information Pack Regulations 2006).

Once marketing has started, it is assumed that a property remains on the market until it is taken off the market or is sold. The phrase “taken off the market” is not defined in the legislation and carries its common meaning. Essentially, a property is not “off the market” if marketing activity is still taking place. If the “reservation” process for the sale of a new home carries with it a cessation of marketing activity it follows that the home can be treated as “off the market”.

2. Local Authority Searches – will these need to be plot specific or will one search for one development be accepted?

The legislation currently suggests that each home will require an individual local authority search which should be no more than three months old at the point of marketing.

Areas for concern:

- To conduct a search per property would cost significantly more than a search per development. A plot specific Local Authority Search would cost circa. £175, whereas if a site or phase search is permitted, the cost for each additional plot will only be circa. £10.00
- Time taken for individual searches rather than development wide search.
- Local authorities will be swamped with requests for searches which no doubt will lead to delays in search results being available which will in turn cause problems in having a HIP ready in time.

HBF Suggestion:

Home builders currently conduct searches based on the whole development. Any clarification required for an individual property is taken up by the solicitor.

DCLG Comments – Under the Home Information Pack Regulations 2006, the local land charges search and the local enquiries must “relate to the property” (see regulation 8(m), (n) and paragraph 2 of Schedule 9) and this would allow a search to for the whole development to be included if it covers the particular property, although we would strongly advise a search per property if the circumstances suggest that that this would yield a different result.

The drainage and water enquiries and model answers set out in Schedule 10 are confined to “the property”. However, if a search against the development would produce the same results as a search against a particular property, then we think this requirement is satisfied.

3. How do you define who is the ‘responsible person’ under the terms of the legislation?

Areas for concern:

- Sometimes home builders will sell homes direct or sometimes instruct an estate agent or sometimes act jointly
- Homes may also be sold by a sales negotiator on site.

Of the different parties involved who is responsible? Can both home builder and estate agency be responsible simultaneously?

DCLG Comments – Section 151 sets out the general principles on who is to be regarded as responsible for marketing a property that is being, or has been put, on the market, and thus the associated responsibility to have a home information pack.

The Act provides that the HIP duties (and the penalties for breaching them) only apply to the person who is responsible for marketing the property in question. There are only two categories of person who can be held responsible - the seller himself, someone who is acting as the seller's estate agent. The responsibility of a seller ceases when there is at least one person acting as an estate agent and the seller is no longer marketing the property himself (see section 153(2) of the Housing Act 2004). Therefore, both the seller and person acting as an estate agent could jointly be responsible persons, but this is unlikely where the seller has left marketing entirely to their agent.

Section 150 of the Act provides that a person is acting as an estate agent for the seller where, in the course of a business, he is instructed by the seller to either introduce a person wishing to buy the property to the seller, or dispose of the property by auction or tender. It is not relevant for these purposes whether or not the person describes himself as an estate agent.

NB - The duties that apply to sellers marketing direct and estate agents marketing on their behalf are different and these are described in sections 152 and 153 of the Act).

4. Selling to investors - do you require a HIP for each individual property if you are selling more than one home to an investor?

Does it make a difference if selling to an investor on one contract for a number of units or on separate contracts?

DCLG Comments – Regulation 27 of the HIP Regulations provides that sales of portfolios of properties are exempted from the HIP duties. In order for the exception to apply, two conditions must be satisfied. Firstly, the sale must involve two or properties that would otherwise be subject to the HIP duties (whether under a single contract of sale for all, or under separate contracts for each property included in the sale). Secondly, the terms of the sale should indicate that the seller would not accept an offer to buy any one of the properties in isolation and that this is made clear in the marketing material.

5. Social housing plus joint marketing/promotion with a housing association – Is a HIP required in any circumstances with regards to a) the provision of social housing for RSLs and b) how do HIPS apply for shared equity schemes?

DCLG Comments – Sales of new homes to a RSL are likely to be covered by the “portfolio” exception described above. Sales of single properties on shared equity terms, either by the RSL or the developer, to individual purchasers are not exempted from the HIP duties although if not marketed to the public or a section of the public, the duties would not arise.

6. Part Exchange – Is a new home purchaser required to provide a HIP when the home builder or nominated partner is accepting a purchaser’s home for part exchange?

If a HIP already exists, can a home builder ‘inherit’ the HIP and use this for the onward sale?

DCLG Comments – In this example there would be no marketing “to the public or a section of the public” and therefore no duty to provide a pack. If a HIP already exists, the home builder may be able to re-use parts of it for a subsequent resale.

However, the documents would have to comply with the terms of the regulations, so that forms required to be completed by the seller would have to be completed by the new seller and any “time limited” documents (e.g. searches) would have to be no more than three months old when marketing begins. It is unlikely, however, that a Home Condition Report, could be reused in this way as the liability of the Home Inspector would not extend beyond the original purchaser and his or her mortgage lender.

7. Copies of the pack – When does a copy of the pack need to be provided?

How is a buyer defined e.g., when just expresses an interest or when pays a deposit? What are the exceptions relating to this? When should an electronic and when should a hard copy be used?

What are the agreed lead-times for providing a requested hardcopy, if an electronic version can be readily accessed?

What originals are required?

If a prospect fails to proceed are they obliged to return the pack?

HBF Suggestion – make it allowable that the provision of a web link, from which the HIP can be downloaded, satisfies the requirement, unless a prospective buyer requests a hard copy.

DCLG Comments – A copy of the Pack only needs to be provided to a potential buyer when he or she asks for one. “Potential buyer” is defined in section 177(1) of the Housing Act 2004.

If the potential buyer is happy to have an electronic copy that is fine but a paper copy must be provided if not (see section 156(11) of the Housing Act 2004). Where the potential buyer insists on a paper copy, the seller is entitled to make a reasonable charge to cover copying and postage costs.

The seller may refuse to provide a copy of the pack in certain limited circumstances without the risk of incurring a penalty and these are described in section 156(4) of the Housing Act. There are three possible reasons, as follows:

- Where the seller has reasonable grounds to believe that the person could not afford the property in question.

- Where it is believed that the person making the request is not really interested in buying this particular property or one like it.
- Where the potential buyer is not a person to whom the seller would wish to sell the property.

This does not affect anyone's rights under the legislation governing discrimination on the grounds of race, sex or disability so this provision cannot be used to contravene that legislation.

If a paper copy is requested and none of the above reasons for refusal apply the request should be complied with within 14 days of the request.

This can be delayed, however, if the seller decides to impose conditions on the release of a copy (see section 157 of the Housing Act). For example, the seller could seek to impose a condition that would require the return of the copies if the transaction did not proceed. However, the potential buyer must be informed of the proposed condition within 14 days of the request for a copy and, where the buyer agrees to it, the copy should be provided within 14 days of the agreement being reached.

The duty is to provide a copy of the HIP, not “the” HIP. Regulation 5 of the Home Information Pack Regulations 2006 deals with whether original documents must be included in “the” HIP and regulation 6 deals similarly with copies of the HIP..

8. If a sale falls through can the HIP be re-used? And within what time frame?

DCLG Comments - In general terms, certain time sensitive documents must be 3 months old at the first point of marketing and there is no obligation to update documents if marketing is continuous (see regulation 14 of the Home Information Pack Regulations 2006). If an agreed sale falls through and the property is put back on the market within 28 days, no “new” first point of marketing arises, and there is no need to re-examine the time sensitive documents to see whether they are still current. However, in certain circumstances where there has been a break in marketing a new first point of marketing will arise and certain documents may need to be refreshed. Please consult regulations 3, and 14 of the Home Information Pack Regulations 2006 for a detailed explanation.

9. Can a home be sold with elements of the pack missing?

DCLG Comments – marketing can start with an incomplete pack where certain required items cannot be obtained quickly (i.e. within 14 days of request). In these cases the missing item should be added to the pack when it becomes available. There is no duty in the HIP legislation to delay completion until the missing item is received, however, so it would be possible to complete the sale without it.

10. Energy Performance Certificates

Where can a copy of the proposed form of the EPC be downloaded?

When and how will the register of Energy Assessors be available?

Will the content of the EPC be the same for existing homes and new homes?

For homes sold off plan, how will the energy rating be predicted?

Will finished properties need to be physically visited?

Can the EPC be a desk top (electronic) exercise for a new home – currently the SAPs rating provided to purchasers is done in this way, usually by architects?

Can builders with the necessary qualifications self-certify?

Can EPCs be issued against a nominated 'standard house type', if we build to the same specification?

These questions must be dealt with urgently to ensure that delays are not caused next summer in EPCs being issued.

DCLG Comments – to be discussed at meeting on 12 December.

11. Report on a home not physically complete

Does this now apply now that the HCR is no longer mandatory?

DCLG Comments - For Ministers to decide but agree provisionally that the report on a home not physically complete was associated with the HCR requirements and is probably not necessary as a required component under revised regulations.

12. Do you need to be registered as a pack provider?

What is the position of home builders who are able to provide the mandatory key new homes information available to purchasers?

DCLG Comment – No requirement for home builders to be registered pack providers (but may be affected by possible new requirement for pack providers to belong to independent redress scheme and eligibility for funding for the area trials).

13. Do home builders need to inform people of a prospective change in the site plans once a HIP has been issued for a particular plot?

DCLG Comment - Regulation 18 applies to the updating of required documents in the HIP. The first point to note is that this only requires documents to be updated where the "responsible person" (i.e. the Seller or estate agent) actually amends, obtains or creates a further version of a document. It avoids imposing a requirement to update where changes to a document occur without the knowledge of the responsible person.

Where the regulation does require the HIP to be updated, it only applies where the duty to have a valid HIP subsists i.e. in cases where the property is on the market. If the property is under offer and no marketing is taking place, there is no requirement to keep the Pack updated. However, if the sale fell through and the property was

not put back on the market within 28 days, a new first point of marketing would arise (see above). The responsible person would then need to re-evaluate the content of the pack to make sure that the documents were up to date.

14. Do you have to inform people every time a required item changes? Can this be satisfied by the electronic transmission of the amended item?

DCLG Comment – See above, no requirement to update pack documents when marketing has stopped.

15. What is the “Landmark” central registry?

- If able to provide own packs, does each individual pack have to be registered?
- What if the pack is updated?
- Is the information on registered properties available to the public?

DCLG Comment – The register will contain electronic versions of HCRs and, possibly, stand alone EPCs as well. It will not contain complete home information packs. If a new HCR is obtained on a property the new version will go on the register (previous versions will also be retained on the register). There will be strict rules on who will be given access to the register. Those involved in a sale will have access to the relevant report but there will be no general public access to the register. (See attached list of FAQs also).

16. What VAT is payable?

DCLG Comment – The VAT treatment of home information packs will depend on a number of factors. With the exception of local searches provided by a local authority, and documents provided by the seller himself, most elements of the pack are likely, as is the case now, to be liable to VAT. The rules on VAT are a matter for HM Revenue and Customs (HMRC). They have told us that Home Information Packs will be subject to the normal rules of VAT, as set out in the VAT Act 1994, and they should be able to provide advice if necessary.

17. Development/communal/plot landscaping – is this required for the HIP

This element will change right up to the day of completion.

NB: Estimated day of completion – could be a season, month, week or day. Only at the end of the process can this be specified as a day.

DCLG Comment – This information does not appear to fall within the required part of the Pack (and see comments against 13 & 14 above concerning no requirement to update pack documents when marketing has stopped.)

Overall: *Would the DCLG modify the HIPs requirements for volume new build in light of the above points and on the basis that there will be certified bodies such as NHBC.*

DCLG Comment – Will consider need for amendments in the light of further discussions.

Further Information:

For further information on how to get involved with the HIPS dry-run contact:

Chris O'Dea
Dry-run Manager
Home Information Pack Programme
Tel: 0207 944 4400 ext 19511
Mob: 07740 795936

Chris.ODea@communities.gsi.gov.uk

If you have any further questions or enquiries in relation to HIPS please contact:

Jo Turner
Marketing Manager, HBF
Jo.turner@hbf.co.uk
Or John Slaughter
Director of External Affairs, HBF
John.slaughter@hbf.co.uk

HBF, 1st Floor Byron House, 7-9 St James's Street, London, SW1A 1DW
0207 960 1600 info@hbf.co.uk www.hbf.co.uk