ACKNOWLEDGEMENTS

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BACKGROUND AND PURPOSE

Following the Efficiency Scrutiny on the Management of the Civil Estate, published in May 1994, Government Departments have been given responsibility as principals for the property they occupy. To support them in fulfilment of this responsibility an executive agency was created: the Property Advisers to the Civil Estate (PACE). The main functions of PACE are to:

- co-ordinate the Government's activity on the Civil Estate;
- promote rationalisation of the Estate;
- provide Departments with a body of 'off-the-shelf' advice and support; and
- provide intelligent customer support on repayment terms to those Departments who do not have in-house facilities.

The Estates Services Guide has been designed to assist Departments with their property management responsibilities. In particular their role as an 'intelligent customer' appointing, instructing and monitoring consultants. Departments may rely on their own in-house expertise for this or buy in such support from PACE. Whichever route they choose Departments retain the final responsibility for all decisions about the property they occupy.

The Guide assumes that legal advice will be provided in house by the Solicitors Office, Scottish Executive, Victoria Quay, Edinburgh but that Departments will 'contract out' estate surveying services. In order to ensure consistency the providers of these services are referred to as 'legal advisers' and 'property advisers' respectively. From time to time Departments may employ other specialist consultants and these are referred to where necessary.

The Guide has been written specifically to assist informed lay persons and is not intended to be a substitute for professional advice from lawyers and surveyors.
The Estates Services Guide (ESG) provides advice on commercial property, mainly offices. It does not cover residential or agricultural property. It should be borne in mind that the scope of issues that may arise whilst managing a Department’s property portfolio and accommodation needs is vast and cannot be covered comprehensively in a Guide such as this. This Guide is intended to cover the main topics and common themes and to provide a grounding on which to seek further advice when required.

For each subject addressed, the Guide briefly describes the processes involved, with particular emphasis on the initial stages and any formal notices which may require action by the Department. Where appropriate, each sub-section concludes with points and the heading: *What should you do?*. These points are to advise on what area of professional expertise may be required and what specific advice can be expected from appointed specialist advisers.

Throughout the Guide reference is made to legislation and other sources of guidance available to Government Departments. Departmental property managers should ensure that their property and legal advisers are aware of and comply with current legislation and guidance especially where it is specific to the Crown.

A list of references is provided at the end of the Guide. Copies of these and further information can be obtained from the issuing Department or by contacting PACE Central Advice Unit (CAU).

The Estate Services Guide (ESG) will be updated from time to time when necessary and CAU will also publish Information Notes giving details of any important changes.

The Guide is divided into five main chapters: Introduction, Strategy, Acquisition, Estate Management and Disposal. Each chapter is further divided into sections (e.g., MGT 2.0 Lease Requirements), sub-sections and where necessary sub-sub-sections. The contents pages at the front of each chapter are structured to allow direct access to sub-section references. Alternatively, there is a fully cross-referenced index at the back of the Guide. The top of the page header icon carries the chapter, section and sub-section confirming the page’s location in the context of the whole Guide. At the bottom of the page is the publishing information showing edition and amendment issue dates. The referencing system is in numerical order based on chapter prefix followed by the section reference.
The abbreviations denote the main chapters as follows:

- **INTRO**  Introduction;
- **STRAT**  Strategy;
- **ACQ**  Acquisitions;
- **MGT**  Estate Management;
- **DISP**  Disposals;
- **GLOSSARY**  Glossary of Terms;
- **REFERENCES**  List of References;
- **INDEX**  Index.

The right hand margin contains, where appropriate, icons relating to the adjoining text. These are shown below:

- **⚠️** This warning triangle indicates where particular care should be taken to ensure that Departments or their advisers are taking relevant action to avoid prejudicing their property interest. Frequently this will relate to formal notice periods but at other times specialist advice should be sought on particular issues.

- **➡️** This icon is the cross-referencing code to other related parts of this or other PACE Guides. The reference includes the abbreviated code used to identify parts and sections in the Guide, and apart from references to this Guide, is prefixed by the abbreviated Guide name. A list of abbreviations is included later in the section.

- **➡️** This icon is cross-referencing other publications mentioned in the text. The References chapter at the back of this Guide contains further information.

- **👑** This crown icon denotes those areas where Crown Immunity exists or there are circumstances particular to the Crown.

**What should you do?**

1. Ensure that you have access to a complete set of PACE Guides and Information Notes

2. Check the availability of key reference documents listed in the References chapter.
INTRO 1.3 ABBREVIATIONS & ACRONYMS USED IN THE GUIDE

AONB  Area of Outstanding Natural Beauty

BREEAM  Building Research Establishment Environment Assessment Method

CAD  Computer Aided Design

CAIS  Capital Asset Information System

CAU  Central Advice Unit

CECA  Civil Estate Co-ordination Agreement

CFER  Consolidated Fund Extra Receipt

CILOR  Contribution in Lieu of Rates

CLEUD  Certificate of Lawfulness of Existing Use or Development

CLOPUD  Certificate of Lawfulness of Proposed Use or Development

DAO  Dear Accounting Officer letter (Treasury Guidance)

DEOA  Departmental Estate Occupancy Agreement

DETR  Department of the Environment, Transport and the Regions

DOE  Department of the Environment (See DETR)

EIA  Environmental Impact Assessment

EZ  Enterprise Zone

FRI  Full Repairing and Insuring Lease

GACC  Guide to the Appointment of Consultants and Contractors (PACE publication)
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<td>GHBAU</td>
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<td>GREEN BOOK</td>
<td>Treasury Guidance &quot;Appraisal and Evaluation in Central Government&quot;</td>
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<tr>
<td>IR</td>
<td>Internal Repairing Lease</td>
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<tr>
<td>ISVA</td>
<td>Incorporated Society of Valuers and Auctioneers</td>
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<td>JOB</td>
<td>Jointly Occupied Building</td>
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<tr>
<td>KPI</td>
<td>Key Performance Indicator</td>
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<td>LPA</td>
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<td>NDPB</td>
<td>Non-Departmental Public Body</td>
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<td>NHA</td>
<td>National Heritage Area</td>
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<td>NIA</td>
<td>Net Internal Area as defined in the RICS/ISVA Code of Measuring Practice</td>
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<td>PDS</td>
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<td>PDO</td>
<td>Permitted Development Order</td>
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<td>PMG</td>
<td>Premises Management Guide (PACE publication)</td>
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<td>PPP</td>
<td>Public Private Partnership</td>
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<td>PRO</td>
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<td>RICS</td>
<td>Royal Institution of Chartered Surveyors</td>
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<td>ROB</td>
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<td>RV</td>
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<td>SAC</td>
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<td>SDD</td>
<td>Scottish Development Department</td>
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<td>SE</td>
<td>Scottish Executive</td>
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<td>SMC</td>
<td>Scheduled Monument Clearance</td>
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<td>SO</td>
<td>Scottish Office</td>
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<td>SPA</td>
<td>Special Protection Area</td>
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<td>SPZ</td>
<td>Simplified Planning Zone</td>
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<td>SSSI</td>
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<td>“Town and Country Planning (Use Classes) (Scotland) Order 1997</td>
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<td>UDC</td>
<td>Urban Development Corporation</td>
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<td>VOA</td>
<td>Valuation Office Agency</td>
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DEPARTMENTAL RESPONSIBILITIES

Departments’ responsibility for the management of the property they occupy and their accountability for the decisions they make is stated in HM Treasury Guidance. Treasury guidance also provides general instructions as to how these responsibilities should be fulfilled.

The first and second parts of this section refer to Treasury guidance and the Government’s environmental policies. These parts provide a summary of some of the key ideas and assumptions. Individual Departments will develop internal organisational structures and links with external advice providers to ensure that responsibilities are fulfilled and accountability maintained in the way that best suits them.

The third part of this section describes the ‘Intelligent Customer’ role, and the fourth part suggests examples of specific areas of estate management that Departments should be responsible for, either by using in-house staff or by employing PACE. The fifth part describes how professional advisers can be appointed to support the estate management team.

The sixth part draws attention to areas relating to estate management in which premises managers should be careful to comply with, or take account of, Government policy.

Premises Managers should read the relevant Treasury and DETR guidance together with Departmental policy guidance to ensure that they fully understand their role within their Department and Government.
INTRO 2.1 HM TREASURY GUIDANCE

All Departments are accountable for the management of their affairs including their property decisions. Almost all property decisions will carry financial implications and premises managers should work together with finance officers to ensure compliance with HM Treasury Guidance.

DAO (GEN) 1/96 ‘Efficiency Scrutiny on the Management of the Civil Estate’

The Treasury has issued DAO (GEN) 1/96, amended by DAO (GEN) 15/96, setting out the roles and responsibilities of Departments and PACE in relation to the management of the Civil Estate. This document includes the Departmental Estate Occupancy Agreement (DEOA) and the Civil Estate Co-ordination Agreement (CECA).

Departments’ responsibilities include:

- maintaining the premises they occupy;
- ensuring that they are suitable for operational use;
- ensuring that they meet statutory and contractual requirements;
- ensuring they retain their value as a Government asset.

They are fully responsible in respect of their properties for all aspects of management including final decisions on negotiations with landlords and tenants. They must ensure that all notices are properly dealt with, making payments to landlords, contractors and consultants, dealing with receipts from tenants, and with all claims in respect of property. Departments are also responsible for complying with lease terms, the safety of staff and visitors, ensuring all aspects of estate management are exercised cost effectively and in an environmentally friendly way and obtaining necessary Parliamentary and Treasury Authority for expenditure.

Departments will also be responsible for producing estate strategies to cover all their properties. In addition, Departments will be responsible for disposals and new acquisitions. When acquiring properties Departments should:

- secure the necessary funding;
- pursue the solutions supported by investment appraisal;
- appoint property advisers and legal advisers where necessary;
- plan, manage and fund in-going works; and
- obtain value for money with full regard to the lifecycle.
Departments should co-operate with each other and with PACE wherever this ensures value for money for the Civil Estate as a whole. This is particularly important in relation to PACE’s responsibility for co-ordination and estate rationalisation. The CECA sets out detailed working practices and timetables covering this aspect and Departments should refer to it for more detailed information.

HM Treasury Guidance - “Government Accounting”

HM Treasury has issued guidance in “Government Accounting” which should be followed by all Departments. Financial and property matters are closely related and property managers should be aware of the financial implications of their decisions. ‘Government Accounting’ is undergoing a process of comprehensive revision to update, incorporate and consolidate financial guidance currently issued in other forms such as ‘Dear Accounting Officer’ and ‘Treasury Officer of Accounts’ letters.

HM Treasury Guidance - “Capital Charging for Property - Accounting Guidance”

This publication sets out the accounting instructions for Departments to implement in order to operate the system of accounting for capital assets such as property.

Capital Charging is an accounting procedure, but one that is, as is so often the case, intimately associated with the property estate and how it is managed. This publication was introduced and summarised in a Treasury letter DAO (GEN) 16/96, and amended by DAO (GEN) 6/97.

The Capital Charge and depreciation elements allow Departments to bring into the accounts the value of the property they own and use. The Capital Charge is based on the ‘asset value’ or ‘value in existing use’ of the property. The depreciation element is related to the expected remaining useful life of that asset. Departments are expected to show a fixed percentage return on the value of their capital assets and, also, to allow for the depreciation element in their accounts. Any changes to the property estate such as acquisition, disposal, refurbishment, alterations are likely to have a ‘knock on’ effect on the Capital Charge and depreciation. Thus decisions made in regard to the property will have a direct effect on the Department’s business accounts and financial health, but in ways that may not be easily apparent. It is important for estate and premises managers to be aware of the Capital Charging process and to liaise closely with finance officers and, where appropriate, experienced property advisers to assess the implications of their property plans.

What should you do?

(see over)
**What should you do?**

1. Ensure that you are familiar with all Treasury guidance relating to property.

2. Ensure that mechanisms are in place for you to be informed of changes to Treasury guidance issued to Principal Finance Officers.

3. Ensure that mechanisms are in place for informing finance officers of decisions and changes relating to property.

4. Liaise with finance officers within your Department in order to understand the financial implications of property decisions, and if you have a query concerning property finance and accounting.

5. Ensure that you are familiar with the latest Treasury Guide notes relating to green procurement.
INTRO 2.2 ENVIRONMENTAL PERFORMANCE POLICY

All Departments are required to develop their own strategies for 'greening' their operations and improving their environmental performance. Almost all property decisions will have environmental implications. Some may be very significant and costly (e.g., specifying air-conditioning). Premises managers should work closely with environmental managers and advisers to ensure compliance with the latest guidance issued by the Department of Environment, Transport and the Regions (DETR) and the 'Greening Government' team.

Government policy on 'Greening Government Operations' is summarised in the DETR's "Model Policy Statement for Greening Government Operations" which provides a model designed to help Departments develop their own strategies for greening their operations taking account of Government policies and best practice. These policies as they relate to estate management are summed up in that document as follows:

The Department will continue to apply best practice in the management of its estate in particular by:

- ensuring that land owned by the Department does not pose an actual or potential threat to man and the natural and built environment, e.g., from contamination of the soil, ground and surface water, hazards to buildings and building materials and the migration of gas;

- ensuring that the conservation of species and habitats is respected, especially if sites of international or national importance are involved, or where the priorities of the UK Biodiversity Action Plan could be assisted;

- undertaking Building Research Establishment's Environmental Appraisal Method (BREEAM) assessments when planning new or substantially refurbished premises;

- introducing high standards of energy and environmental management;

- improving indoor air quality; and

- adhering to advice on best practice given in guidance such as the Building Research Establishment's (BRE) and Energy Technology Unit's best practice programmes, Building Services Research and Information Association's (BSRIA) "Environmental Code of Practice", The Construction Industry Research and Information Association's (CIRIA) "Environmental Handbook for Building and Civil Engineering Projects".
In certain areas there are agreed Government policies and targets relating to estate management which should be taken into account when Departments draw up their own environmental improvement programmes. These are as follows:

**Energy Conservation:**

The Government’s target is to achieve a 20% improvement in energy efficiency over 1990 level by 31 March 2000.

**Traffic Congestion and Vehicle Emissions:**

Green Transport Plans should have been compiled by all Departments by 31 March 1999 for headquarters buildings and by 31 March 2000 for other buildings where the Department is a major occupier with over 50 staff.

**BREEAM Assessments:**

BREEAM assessments should be undertaken for all new and major refurbishments of existing buildings which should then be regularly reassessed under the BREEAM existing office update scheme.

The DETR team has produced many publications which should be referred to by premises managers and which will assist them in most areas of estate management. Of particular relevance to the issues covered by this Guide is “Towards more sustainable construction - Green Guide for Managers on the Government Estate” published in March 1999. The ‘Green Code for Architecture’ an extract from this publication is included below and should be referred to by Departments planning any new building works, alterations, demolitions and refurbishment.

Other publications can be found by accessing the DETR’s Internet ‘Greening Government’ website on http://www.environment.detr.gov.uk/greening/gghome.htm.
Green Code for Architecture

Based on the objectives of the Building Research Establishment’s Environmental Assessment Method (BREEAM)

The principles are:

- demolish and rebuild only when it is not economical or practical to reuse, adapt or extend an existing structure;

- reduce the need for transport during demolition, refurbishment and construction, and tightly control all processes to reduce noise, dust, vibrations, pollution and waste;

- make the most of the site, e.g. by studying its history and purpose, local micro-climates and the prevailing winds and weather patterns, solar orientation, provision of public transport and the form of surrounding buildings;

- design the building to minimise the cost of ownership and its impact on the environment over its life span by making it easily maintainable and by incorporating techniques and technologies for conserving energy and water and reducing emissions to land, water and air;

- wherever feasible, use the construction techniques which are indigenous to the area, learning from local traditions in materials and design;

- put the functions of the building and the comfort of its occupants well before any statement it is intended to make about the owner or its designer. That is, make it secure, flexible and adaptable (to meet future requirements) and be able to facilitate and promote communications between staff;

- build to the appropriate quality and to last. Longevity depends as much on form, finishes and the method of assembly employed as on the material used;

- avoid using materials from non-renewable sources or which can not be reused or recycled, especially in structures which have a short life;

- use natural ventilation, unless there are special requirements.

Further guidance on the implementation of environmental improvements in compliance with Government policy can be found in the PACE “Premises Management Guide” and the PACE “Guide to Requirements for Office Buildings” (ROB).

What should you do?

(see over)
What should you do?

1. Ensure that you are aware of your Department’s environmental policy.

2. Ensure that the relevant DETR, PACE and other guidance publications are available for reference and that you are familiar with their contents.

3. Ensure that there are mechanisms in place to keep you informed about the latest developments in best practice and Government policy.

4. Ensure that you are familiar with the latest Treasury Guide notes relating to green procurement.
THE INTELLIGENT CUSTOMER ROLE

While it is expected that Departments will ‘contract-out’ estate and legal services to professional property and legal advisers it is essential for Premises Managers to appreciate the remaining minimum requirements for the in-house (within Government) role. The Treasury requires the Department to retain sufficient competent intelligent customer support resource to be able to brief and manage professionals such as property and legal advisers, ask the right questions, know when the correct answers are being given and decide what further action to take. The required expertise can be achieved by:

- training in-house administrative staff to the appropriate level of competency; or
- employing the requisite professionals in-house; or
- retaining PACE.

Buying intelligent customer support from the private sector under a framework agreement or contract is not an option open to the Department.

To help the Department assess its resource needs some amplification of the role is set out below.

The term ‘intelligent customer’ relates to a residual function that remains with the purchaser of services once the provision of such services has been outsourced. It is a role that must remain within Government. Whatever the source of supply the purchaser of property related procurement or supply functions needs to retain sufficient in-house knowledge, experience or expertise relating to those functions to plan, specify, commission and to subsequently efficiently manage the services being procured to ensure best value for money is obtained and environmental impacts are minimised.

The scope of the intelligent customer capability required will necessarily be a matter of judgement based not only on the nature of the Department’s property but also its approach to property management. Whilst it might for example be possible in some areas to set a consultant to judge other consultants, and therefore reduce the number of in-house purchasing and contract management staff, that is not always feasible. Ultimately, there remains with the Department the residual responsibility for both sound management and public accountability. Purchasers must be able to demonstrate value for money in the services procured through the management of budgets, monitoring of expenditure and benchmarking of services.

What should you do?

(see over)
What should you do?

1. Ensure that your Department has sufficient in-house expertise to carry out the ‘intelligent customer’ role properly, OR

2. Employ PACE to provide this service.

3. Ensure that you are aware of your Department’s existing arrangements and make contact with your property adviser in PACE if appropriate.
EXAMPLES OF ESTATE MANAGEMENT RESPONSIBILITIES

The following are suggested as examples of how estate management functions might be defined and give a flavour of the scope of responsibilities. More detailed information and advice can be found within the body of this and other PACE Guides.

The organisational framework within which estate management takes place will be individual to each Department.

Policy, Standards and Information

- Preparation, review and implementation of Estate Strategy and Policy having full regard for the optimum combination of whole life costs and quality to meet customer requirements;
- Development of accommodation standards and targets;
- Development and implementation of DETR’s “Model Policy Statement for Greening Government Operations”;
- Monitoring of standards and performance across the estate;
- Providing guidance on estate-related Health and Safety issues and ensuring compliance within the workplace;
- Monitoring and reporting energy consumption and resource use;
- Provision of training to ensure effective delivery of estate management services;
- Liaison with the Property Advisers to the Civil Estate (PACE);
- Liaison with other Government Departments; and
- Development, management and maintenance of information systems used to inform the management of the estate.
Estates Expenditure

- Advice and co-ordination on the allocation and re-allocation where appropriate of funds relating to occupancy costs;
- monitoring of expenditure on occupancy costs;
- preparation of business plans for relocation or re-organisation of occupancies;
- management and Quality Assurance Audit on practices and procedures relating to estates expenditure;
- payment of occupancy related charges;
- management of forward maintenance programmes; and
- management of budgets.

Management of Property and Legal Advisers

- Contractual control of commissions;
- management of service providers; and
- evaluating the performance of the property and legal advisers in conjunction with end users by means of review meetings and Quality Assurance Audits.

What should you do?

1. Ensure that you are aware of the division of roles and responsibilities within your own organisation.
2. Ensure that you are aware of the extent of your own responsibility.
3. Make contact with appropriate advisers.
The services of professional advisers will be required in varying degrees in most aspects of estate management. It is important that professional services are procured in the correct way in order to obtain the best possible service for the Department and to prevent any allegations of unfairness or fraud. PACE Central Advice Unit has developed its “Guide to the Appointment of Consultants and Contractors (GACC)” to assist Departments in this area of procurement. Departments may also have their own Procurement Codes, which should be complied with.

The following generic strategies are available for the Department’s consideration when procuring professional services to assist in the management of the estate:

a) separate property adviser(s) and legal adviser(s). Could be varied by allowing the property adviser to obtain direct legal services; or

b) in-house property advisers with outsourced legal advisers; or

c) property and legal advisers provided through a facilities management contract. Could be varied by procuring legal advisers separately; or

d) a mixture of (a) to (c) eg (c) for individual large properties and (a) for the rest;

Additionally, expert advisers should be consulted wherever necessary eg consultants with appropriate expertise in environmental issues, or specialists in the conservation of historic buildings.

The Department’s procurement strategies will evolve from considerations in both the Intelligent Customer Role and Estate Strategy.

Departments with a small and/or scattered estate should explore the possibilities of using other Department’s existing property and legal contracts.

Departments wishing to appoint building surveyors, architects and other members of the project team are advised to use GC/Works/5 General Conditions for the Appointment of Consultants (1998). GC/Works/5 (1998) has been developed through PACE Central Advice Unit and is the standard Government form for the appointment of construction professionals.

What should you do?

(see over)
What should you do?

1. Ensure that the Procurement Strategy will support the Estate Strategy and that the required Intelligent Customer resource will be available.

2. Refer to the “Guide for the Appointment of Consultants and Contractors” (GACC).

INTRO 2.6 GENERAL

INTRO 2.6.1 Code of Practice on Commercial Property Leases

Much of this Guide is concerned with commercial property leases. Following a review by the Department of the Environment in 1994, the property industry produced a “Code of Practice on Commercial Property Leases”. Ministers have endorsed this Code of Practice and Departments should follow it in their commercial property dealings.

INTRO 2.6.2 Openness, Transparency and Fraud Prevention

Your Department will require all staff at all times to act honestly and with integrity and to safeguard the public resources for which they are responsible.

Fraud is an ever-present threat and there are many and various ways in which fraud could occur within the estate management arena. Managers and staff should always be aware of this potential and be vigilant in preventing and detecting fraud. The Department’s responsibilities are set out in Chapter 37 of “Government Accounting”:

‘Departments should develop and maintain effective controls to prevent fraud and to ensure that if fraud occurs it will be detected promptly. If fraud occurs Departments must carry out a vigorous and prompt investigation. They should take the appropriate legal and/or disciplinary action in all cases where that would be justified; and they should make the necessary changes to systems and procedures to ensure that similar frauds will not happen again.’

Departments will develop their own Fraud Policies and to assist in this HM Treasury has produced guidance “Managing the Risk of Fraud - a Guide for Managers”. All staff should ensure that they are familiar with and comply with their Department’s own policy.

Chapter 37 of “Government Accounting” sets out recommendations concerning record keeping and external audit requirements. It is essential that good and complete records be kept to maintain the audit trail and to guarantee that all estate management processes described in this Guide are carried out in an open and transparent way.

PACE’s “Premises Managers Guide” and “Guide to the Appointment of Consultants and Contractors” contain other useful guidance on openness, transparency and fraud prevention.
INTRO 2.6.3 Need to follow departmental guidance and policy

At all times when using this Guide premises managers should ensure that any action taken is at the appropriate delegation level and complies with their own Departmental policy and procedures.
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This section of the Guide gives a basic understanding of estates responsibilities, functions and roles together with advice on devising a strategy, procuring services tailored to particular estate requirements, managing performance and achieving best value.

Each Department is responsible for ensuring that the accommodation it occupies is suitable for its business needs and supports its business plan.

Where Departments achieve this by owning property they are responsible for maintaining their estate, ensuring that it supports the Department’s business plan, meets statutory and contractual requirements and retains its value as a Government asset. “The Efficiency Scrutiny of the Civil Estate”, DAO (GEN) 1/96, amended by DAO (GEN) 15/96, devolved responsibility for property to Departments. That responsibility includes:

- appointing and instructing property and legal advisers, eg Scottish Executive Solicitor, where necessary to support strategic planning, acquisitions, disposals, rent reviews, lease breaks/expiries/renewals, rating, dilapidations, licences for works, service charges and insurance management;

- receiving and dealing with all notices from landlords or their appointed agents. This involves, for example, direct negotiations on rent reviews or lease renewals, compliance with lease terms and all contractual liabilities, and receipt and service of contractual or statutory notices;

- final decisions on all negotiations with landlords and tenants;

- dealing with local or other public authorities;

- all communications with statutory undertakers, utility companies and suppliers of other services;

- granting wayleaves or licences to utility companies or other outside bodies, as may be required from time to time on a commercial basis;

- the safety of staff and visitors to their properties;

- observing all statutory, technical and mandatory requirements relating to land, buildings and services;

- ensuring that all aspects of estate management are exercised cost effectively and in accordance with the ‘Green Government’ initiative; and

- obtaining any necessary Parliamentary or Treasury authority for expenditure.
Departments are also responsible for actively managing their accommodation provision. Departments may decide to provide accommodation for their business operations by traditional property ownership, and the majority of this Guide deals with issues arising from traditional estate management. There are, however, alternative solutions, including Private Finance Initiative, which are also dealt with in the Guide and which should be considered by Departments alongside traditional accommodation solutions.

Within an active estate management programme Departments should consider rationalisation of their operations within the Civil Estate, disposal of property and new acquisitions. When rationalising, acquiring or disposing of property, Departments must consult with PACE and must:

- pursue the solution supported by the appraisal and evaluation process;
- secure the necessary funding;
- plan, fund and manage any associated works.

**Estates Strategy Process**

- Implement Strategy
- Monitor and Review
- Gather Information
- Develop Plan/Strategy
- Analyse
- Identify Needs and Objectives
- Continuous Revision

---

**GENERAL STRATEGY**

**STRAT 1.0**

**STRAT 4.5**

**ACQ 1.0**

**DISP 1.0**
After staff related costs, estate and premises related costs are usually the second most significant element of Departments’ expenditure. A strategic approach to the management of the estate is essential in supporting and adapting to changing business needs. Strategies need to be regularly reviewed at least once a year and/or when there has been a significant change in policy.

The Strategy should be led by the needs of the business, but these must be weighed against the need for efficient and sustainable management of the estate. Ideally the Estate Strategy should be drawn up bearing in mind the Business Plan and the opportunities created or restraints imposed by the existing property estate. By identifying incompatibility early in the planning stage it should be possible to appraise a variety of options and develop imaginative solutions which provide the working environments the Department requires at least cost to the Exchequer.

The objectives of the strategy are to:

- support the user’s Business Needs;
- ensure Departmental compliance with Statute and Policy;
- maximise the useful life of properties by timely maintenance; and
- maintain the value of the portfolio as a Government asset by effective management of the estate.

The benefits of having a strategy flow from being in the right place, at the right time, at the right cost, and include:

- avoiding the cost of surplus space;
- making the best use of resources;
- protecting the environment by moving towards a more sustainable use of property having regard to life cycle costs;
- building in the right amount of flexibility to allow for changing needs;
- creating a working environment which maximises business performance; and
- managing a major and costly asset effectively and sustainably.
Certain Government Departments have opted to use the Private Finance Initiative (PFI) to outsource all or most of their accommodation needs. The PFI or other Public/Private Partnership option such as Private Developer Schemes (PDSs) should be considered during the development of the Strategy as this may be appropriate and cost effective. As the office market is changing in response to user demands such alternative solutions are likely to become increasingly familiar. For most Departments, however, property ownership remains the usual method of providing the accommodation they occupy, and this inherited portfolio requires careful management if it is to support the Department’s core business effectively.

Where property is owned (including leased property) or occupied under an agreement from another Government Department the Estate Strategy should classify properties into those preferred for continued use, those needed for a short period only and those which are surplus to requirements. It should also identify requirements for additional accommodation or relocation. There should be an appreciation of which properties have opportunity value that can be exploited, and which impose restrictions on future use and flexibility. Further advice on future planning can be found later in this Guide.

The Strategy should identify and plan for a programme of maintenance or refurbishment, acquisition, disposal and demolition. In doing so the Strategy should consider environmental concerns in the context of Government policy on sustainability and ‘Greening Government’ initiative. In considering the issue of sustainability full regard should be given to the principles and objectives of the Government’s ‘Green Code for Architecture’ contained in the “Green Guide for Managers of the Government Estate” and which is reproduced in the Introduction.

A Property Plan should be developed from the Estates Strategy and bring together the strategic objectives derived from

- a Business Needs Appraisal; and
- a Property Assessment.

**What should you do?**

1. Liaise closely with business planners and users throughout the process.
2. Set up a mechanism for revisiting and reviewing the Estate Strategy.
3. Provide PACE with revised Estate Strategies in accordance with the terms of the Civil Estate Co-ordination Agreement (CECA).
4. Consider the use of IT solutions to achieve efficiencies of space.
KNOW YOUR PROPERTY
PROPERTY AUDIT and MANAGEMENT INFORMATION

EXISTING PROPERTY ATTRIBUTES
• location
• space
• specifications
• functional suitability
• liabilities (fixed/variable costs, lease obligations etc)
• condition survey

OPPORTUNITIES
• unused space, alternative users?
• releases, breaks, expiries etc

MARKETABILITY
• value
• potential alternative users

AIM TO MATCH YOUR PROPERTY TO YOUR BUSINESS NEEDS

• identify mismatches, consider and appraise the options for change
• consider operational changes which might produce more effective use of under-used assets
• identify works needed to improve functional utility, appraise the costs and benefits
• seek input from PACE
KNOW YOUR NEEDS
BUSINESS NEEDS
AUDIT

PROPERTY STRATEGY
Component parts:
• property assessment
• business needs

DEPARTMENTAL ORGANISATION
• numbers
• functions
• activities
• locations
• image and culture

INTERNAL/EXTERNAL RELATIONSHIPS
• operational plan

PROPERTY NEEDS
• location
• space
• facilities
• services/infrastructure
• quality
• cost

IDENTIFY AND PLAN FOR FUTURE CHANGES IN NEED

REGULARLY UPDATE OPERATIONAL NEEDS AND PROPERTY AUDITS
• work to a rolling 5/10 year plan
• identify key events, look for opportunities to rationalise
• program/targets for disposal
• B/F system for leases, statutory notices etc
• up-to-date procedure systems for statutory compliance etc
ESTATE STRATEGY - CONTINUOUS REVISION

Estates needs

Operational (Business) needs

ESTATE STRATEGY

Informs estate and property management activities

Acquisitions
Disposals
Lease renewals
Maintenance
Capital Expenditure

An effective Estate Strategy

Strategic; Simple; Specific

Monitorable and Measurable

Acceptable to users and customers; Announced (create awareness)

Readable; Realistic

Timely; Timeless (continuous revision)

Practical and Programmed

Logical; Legible; Living (dynamic) and Lodged (with PACE)

Adaptable to changing needs (flexible) and Achievable

Noteworthy; Natural; Navigable and Needful
BUSINESS NEEDS APPRAISAL

As part of developing the Estate Strategy the business needs of the Department need to be appraised as follows:

**Business Plan:** core business activities, priorities and policy, future plans and anticipated changes, need for flexibility, environmental performance.

**Departmental organisation:** staff numbers, function and activities, image and culture.

**Relationships:** with internal and external customers, public access, including public transport, flexible working patterns, changing work styles.

**Accommodation needs:** space requirements, facilities, services/infrastructure, location, quality and cost, energy use, resource use.

The process for appraisal of Business Needs is to look at operational considerations and constraints; future structure, staffing activities, accommodation needs and issues; forecasts of space needs, availability, shortfalls and surpluses on a life cycle basis.

In appraising accommodation needs the feasibility and financial benefits of disposals should be assessed; the possibilities of consolidation investigated; the whole life costs and benefits of acquisitions identified; the feasibility and cost implications of relocations analysed.

The review of relocation options should include:

- analysis of locational constraints (staff and customers, access to public transport, brownfield/greenfield site);
- profile of operational savings;
- identification of relocation costs;
- assessment of property risk;
- review of current premises availability;
- assessment of preliminary suitability; and
- life cycle cost of relocation.

What should you do?

(see over)
What should you do?

1. Ensure that Business Needs are fully appraised and understood as part of the Estate Strategy.

2. Consult with PACE, who will be aware of other Departmental strategic proposals that may dovetail with the proposed Strategy.

3. Ensure that Departmental and Government environmental policies are recognised in the Business Needs appraised.
In order to draw up an effective Estate Strategy it is essential to be aware of the current condition of the property portfolio and the way in which the accommodation needs of the Department are being met at present.

A property assessment will provide that information and form the basis for evaluating the future performance of the estate and the impact of any changes.

The foundation for the property assessment is a complete and up to date set of records. The extent to which the property estate and other accommodation provision meets the current and future needs of the Department can be measured using appropriate performance indicators, which can be 'benchmarked'. Further information about property records, performance measurement and benchmarking are provided in later sections.

Briefly, the Property Assessment should address each property individually in terms of the following criteria:

**Factual Information**

In terms of size, location, remaining lease term, specification, BREEAM rating, service infrastructure and condition of each property in the property portfolio.

**Performance**

In terms of efficiency of operation, life time costing, compliance with ‘Greening Government’ objectives and capacity for improvement, achieving value and contributing to the Department’s business objectives.

**Liabilities**

In terms of fixed and variable costs deriving from ownership, lease covenants and occupation.

**Flexibility**

In terms of adaptability of the space to meet changing needs and opportunity for release ie lease breaks, expiries, surrenders.

**Marketability**

In terms of potential for re-use within Government, disposal options and costs, market value and ability to raise revenue.
OBJECTIVES FOR THE ESTATE STRATEGY

Set out below are the main objectives which should feature in Departments’ Estates Strategies:

# denotes the mechanism; and
* the benefits.

Objective: to control and reduce operating costs

# Internal ‘charges’ for property costs;
* Encourage release of space;

# Promote whole life costing in place of a ‘low bid’ approach;
* Encourage savings, as the cheapest option may cost more in the long run;

# Space usage targets;
* Improve space utilisation;

# Running cost targets (eg energy, cleaning) allied to standard service contracts;
* Reduce running costs;

# Consider investing in ‘spend to save’ opportunities;
* Improved working environment at reduced operating and environmental cost;

# Forward plan and control acquisitions;
* Secure the right space in the right place at the least price at the right time;

# Forward plan and control disposals;
* Facilitate the release of space and maximise financial benefits;

# Take full advantage of developments in Information Technology.
* Identify priorities for action.
**Objective: to improve operational performance**

- Review and improve estate strategy and staff productivity to best support business needs; *
  - Optimise property usage;  
  - STRAT 2.1
- Review layout and allocation of space; *
  - Increase efficiency;  
  - STRAT 4.1
  - STRAT 4.7
- Review heating and lighting systems; *
  - Increase efficiency;  
  - STRAT 2.1
  - STRAT 4.2
- Improve internal design and fittings; *
  - Enhance staff productivity and improve space utilisation;  
  - STRAT 4.6
- Ensure property matches user needs.
  - Remove constraints on operational performance.
  - STRAT 2.1

**Objective: to maximise operational value**

- Assess full range of funding alternatives (including Private Finance Initiative (PFI) and Public Private Partnerships (PPP)); *
  - Secure optimum finance across property portfolio;  
  - ACQ 2.1
- Investment appraisal of all major works; *
  - Avoid expenditure on inappropriate property (eg lease close to expiry) or at uneconomic cost;  
  - STRAT 2.3
- Assess and quantify risks. *
  - Manage risks effectively.

**Objective: to increase the cost efficiency of Estate Management**

- Establish consultation, planning and implementation with users; *
  - Users should be comfortable with the process so that they participate fully;  
  - STRAT 4.1
- Set standards for service delivery; *
  - Increase efficiency and encourage user co-operation;  
  - STRAT 2.1
- Monitor and regularly review energy and resource use; *
  - Increase efficiency and encourage user co-operation;  
  - STRAT 4.6
Objectives for the Estate Strategy

**Objective: to maximise the benefits**

- Ensure competent and adequate staff resource; *Professionalism generates user confidence;
- Out-source appropriate activities and practice proactive contract management; *Maximise value for money;
- Provide clear focus for property matters; *Reduce duplication of effort and other wasted resource;

**Objective: to comply with policy**

- Plan property related expenditure precisely; *Informs estimates and allows strategic adjustment;
- Identify opportunities within the property portfolio; *Reduce inefficient use of space;
- Establish standards. *Increase staff morale and give better customer perception.
- Achieve flexibility *Fast response to changing needs.
- Ensure compliance with policy objectives eg reduction of surplus space, ‘Greening Government’ initiatives, use of public/private partnering etc. *Governmental and Departmental policy objectives observed and compliance demonstrable.
- Establish measures to monitor compliance. *Ability to measure and demonstrate and improve compliance.
- Monitor the effects. *Feedback and influence policy making.
What should you do?

1. Demonstrate the benefits of the Estate Strategy to senior managers.

2. Ensure the successful implementation of the Estate Strategy through:
   - senior management commitment;
   - consensus on objectives;
   - authority for all decision making identified clearly;
   - reporting lines and procedures defined;
   - establish partnership with business planners;
   - strong user focus;
   - effective systems;
   - measurable performance; and
   - awareness of life-cycle costs and environmental performance.

3. Review the Estate Strategy regularly to keep it vital.

4. Consult with PACE on the proposals, and keep PACE advised on the outcome of Strategy reviews.
The Property Strategy at the Centre of Effective Estate Management

- Analysis of Business Needs
- Funding Constraints
- Future Planning Needs
- Strategy of Best Practice
- Identify Targets for PI's and Audit of VFM, Benchmarking Process with Ongoing Review
- Maintenance of Compliance Standards
- Ongoing Financial Obligations
- Identify Potential for Rationalisation, Disposals, Breaks, Reorganisations etc
- Appraisal and PFI Issues

Objectives for the Estate Strategy

The Estate Strategy

Property Strategy

Departmental Budgetary Control and Planning
STRAT 3.0  DEVELOPING A PROPERTY PLAN

The purpose of developing a Property Plan is to implement the objectives of the Estates Strategy and in particular to:

• manage the fit between the Department's business needs and the available accommodation;

• match accommodation with future business requirements and environmental/energy targets in accordance with the business plan;

• maintain the estate's adaptability to changing needs and provide a basis for consideration of alternative accommodation solutions;

• monitor the condition, the need for repair and the remaining useful life of the buildings;

• control property costs;

• reduce energy and resource use by good management; and

• manage the performance and value for money given by each property.

Critical factors vital to the success of the Development of a Property Plan are:

• Property Records;

• Management Systems; and

• Performance Management.
An effective property record system is critical to the success of managing property and implementing and monitoring a Property Plan. For example, for any property holding it is necessary to keep details of location, boundaries, size, ownership, rights, services, value and a range of other information. HM Treasury Guidance in Chapter 30 of “Government Accounting” instructs Departments about minimum requirements for property databases. There are two sets of property information which Departments should record in accordance with Treasury instructions. These are:

- the Valuation Office Agency’s (VOA) Property Database Requirements; and
- the data Civil Estate Departments are required to supply to PACE in accordance with the Civil Estate Co-ordination Agreement (CECA).

**Valuation Office Agency Property Database Requirement**

A report of a Treasury working party on Capital Asset Information Systems (CAIS) in 1990 made a number of key recommendations regarding the management of property assets which have been adopted in Chapter 30 of “Government Accounting”. Departments are required to set up and maintain a database recording all their property and to develop appropriate interfaces between their property databases and other management information systems to facilitate the development of performance and efficiency indicators. The property database will feed information into an Asset Register which will enable the Department to manage its estate effectively and to account for its capital assets in accordance with Treasury’s Capital Charging requirements as set out in DAO (GEN) 16/96, amended by DAO (GEN) 6/97, and “Capital Charging for Property - Accounting Guidance”. The database should contain, as a minimum, the detail specified by the VOA in its statement of “Property Database Requirement” developed under the auspices of the Treasury CAIS working group and issued to all Departments in May 1992. This includes:

1. Site Data: (A) Interest & Valuations:
   - address
   - description
   - tenure
   - local authorities
   - restrictions

(B) Physical Data:
   - size
   - services
   - infrastructure
2. Building Data: * use  
               * description  
               * condition  
               * maintenance liabilities  
               * construction date  

3. Performance Indicators: * running costs  

4. Leasehold Data Requirements: * landlord  
                                    * interest  
                                    * term  
                                    * rent  
                                    * review pattern  
                                    * improvements  
                                    * sub-letting

The above list is merely an extract and Departments should consult the CAIS “Property Database Requirement” schedule (May 1992) for full details.

**Civil Estate Co-ordination Agreement Property Information System**

Under the terms of the CECA contained in Annex 4, Appendix 2 of DAO (GEN ) 1/96 Departments are required to pass information concerning their property to PACE. PACE will maintain a database recording information about Civil Estate properties including impending ‘events’ such as new requirements and intention to vacate. This will enable PACE to carry out its co-ordination function and facilitate co-operation between Departments to ensure that property decisions secure the best value for money overall. The core data which Departments are required to provide are listed in Annex A of the CECA and summarised below. Departmental Estate Managers within the Civil Estate should be familiar with the CECA and comply with its requirements.

**Property Information that should be exchanged between Departments and PACE.**

The table below is based on Table 1 of Annex A of the CECA and shows the categories of data that should be exchanged between Departments and PACE, and the timing of its provision. In order that PACE is kept informed of the state of the market this includes information not specifically related to property events.
### INFORMATION TIMESCALE

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<th>Timeline</th>
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<tr>
<td>Acquisitions</td>
<td>As soon as a decision has been made to investigate market options</td>
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<td>Intentions to vacate</td>
<td>As soon as potential surplus is identified</td>
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<td>Disposals</td>
<td>As soon as a decision has been made to dispose to the private sector (before appointing agents)</td>
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<td>Approaches from landlords to alter lease terms</td>
<td>When approach is made</td>
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<td>• advance ‘market intelligence’</td>
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<td>• legal completion</td>
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<td>Other notifiable events</td>
<td>When Departments’ records are updated</td>
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<td>Verification exercise</td>
<td>Annual download on mutually agreed date</td>
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<td>Estate rationalisation – phase 2 option developments</td>
<td>On request</td>
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<tr>
<td>Milestones</td>
<td>Within two working days</td>
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Environmental Data

Departments may also find it helpful to record data concerning the environmental performance of their property so that they can take steps to comply with 'greening' policies. These records could include previous use/contamination of the site, ecological information about the site, materials in use including hazardous materials, energy consumption per square metre per annum, water consumption per employee, etc.

Property Management Databases

The CAIS and CECA requirements suggest a minimum level of property information that should be recorded, but as the Departments will require meaningful and comprehensive management information that interprets the raw data, it should seek advice from a property adviser with database knowledge in addition to in-house Information Technology (IT) personnel before establishing a property management database. The property management database is likely to contain a great deal of additional information that managers will find useful if it can be easily accessed. Reference to the later sections of this chapter and advice from property advisers will enable you to decide how to construct your property database and what you want it to do for you. Ad hoc enquiries and reporting are key requirements.

There are a number of procurement options including:

(i) bespoke approach - where a detailed specification of requirements is drawn up and a specific system written to the Department's requirements;

(ii) package solution - on-the-shelf 'proprietary package' is purchased from property management software supplier;

(iii) combined approach - an existing package solution is adapted to suit specific requirements.

There are three types of database model:

• hierarchical;

• networked; and

• relational.

The relational model based on the concept of storing information about entities (i.e., landlords, properties, tenants) and the relationship between those entities, is the approach which is likely to offer most potential for property management purposes.
When considering investing in an IT property management database managers need to be aware of the rising consumption of electricity by Departments, a significant proportion of which is due to the proliferation of IT. The highest energy saving specification should be required.

**What should you do?**

1. Comply with the requirements of the CAIS working group particularly the VOA “Property Database Requirement”.

2. Comply with the requirements of the Civil Estate Co-ordination Agreement (CECA).

3. Take independent advice from a property adviser with knowledge and experience of property management systems.

4. Contact CAU for information on property databases developed by other Departments.
A key function of the Property Record system is the maintenance of up to date records of critical dates occurring in leases. Commonly, the event dates which need to be tracked include:

- **Exprires** • notice dates;
- **Break options** • effective dates, notice dates;
- **Rent reviews** • effective dates, notice and counter notice dates;
- **Internal and external decoration dates** • dates by which works need to be carried out.

Diary records need to be kept of the critical dates in leases. It is also important to include a bring forward system of dates to give early warning of events. Once notices have been served or received, it is also vital to keep a diary record of dates by which counter notices need to be served or other such action needs to be taken, to comply with time limits.

The ability to view expiry and lease break dates several years in advance is an advantage in forward planning for rationalisation and relocation.

Missing notice dates or failing to comply with counter notice provisions, can have serious consequences resulting in paying rents higher than are necessary, lost opportunities such as the ability to break leases or loss of rights of occupation.

Several of these events are ‘notifiable events’ under the terms of the CECA. Through its co-ordination role PACE can help you keep track of lease events and help you ensure that Government’s market advantages are fully exploited such as when negotiating a rent review. In the planning process when considering rationalisation or relocation PACE can advise you where there are opportunities to work together with other Departments and save money. Government policy encourages co-operation of this kind by the terms of the CECA and seeks to promote joined up Government in the ‘Modernising Government’ programme.

**What should you do?**

(see over)
What should you do?

1. Ensure local property manager is aware of the importance of the notice.

2. Maintain diary records of all lease events and a bring forward system for early warning.

3. Ensure notices are passed immediately to legal or property advisers who will have the responsibility of dealing with all subsequent actions and making recommendations.

4. Monitor advisers to ensure that notices are dealt with properly.

5. Comply with the terms of the CECA and liaise with PACE.
IDENTIFYING LEASE OBLIGATIONS

As part of an estate’s records system it is essential to identify and monitor obligations arising under lease covenants. It is necessary to forward plan and budget for these obligations. In addition to the normal covenants to pay rent and service charge it is essential to monitor obligations:

To pay rent

- What is the current rent?
- What is the likely increase or decrease in rent at review?
- What is the rent review pattern?

To repair

- What is the extent of the obligation?
- Does this include rebuild?
- Can the landlord enter to carry out the work?

To decorate

- When do the works need to be carried out?

To insure

- Is the requirement to reimburse the landlord or to arrange insurance direct or does the Crown carry the risk?

NB The Crown does not normally insure.

To break

- Are there positive obligations to comply with the terms of the lease prior to operating a break?

To yield up

- Is there a requirement to reinstate to the original building at the expiry of the lease?

To pay service charge

- What is included in landlord’s services?
- When is payment due?
- Is there an annual reconciliation?

Departments should be aware that from time to time Landlords serve notices under various legislation to enforce these obligations. These notices have time limits for compliance which should be observed. Failure to comply can have serious consequences.

What should you do?

(see over)
What should you do?

1. Identify future lease obligations.

2. Schedule works into a diary system and maintenance timetable.

3. Monitor obligations and relate these to annual budgets.

4. Ensure that any notices are passed immediately to legal and/or property advisers who will have responsibility for dealing with them and for all subsequent action and making recommendations.

5. Monitor the advisers to ensure that notices are dealt with properly.
In addition to a Property Record system the Department needs to establish adequate management systems to support its strategic estate management role. Forward planning, estimating future requirements, defined programmes of rationalisation and space planning definitions should all be documented and managed to achieve the defined objectives. Setting, monitoring and achieving realistic targets is critical to effective strategic planning, as is evaluation of performance across the portfolio. These targets should form part of the management process and be subject to measurement within a Performance Management framework.

Wherever possible IT systems should be utilised in supporting, monitoring and managing the process.

When considering investing in IT managers need to be aware of the rising consumption of electricity by Departments, a significant proportion of which is due to the proliferation of IT.

The highest energy saving specification should be required.
PLANNING AND ESTIMATING

All properties have current and capital costs and these need to be budgeted and managed. In identifying lease obligations and lease planning the future obligations should be fully recorded. The costs arising from these and from feuhold properties need to be forecast and monitored.

These costs can be divided into fixed and variable:

- fixed costs include rent, CILO R/rates, capital charge, service charge, planned preventative maintenance;
- variable costs include repair and decoration, utilities, cleaning, security.

All opportunities should be sought to use good management to reduce variable costs. Reviewing the need may allow for extending the period between decorating. Utilizing recycled materials may reduce repair costs. The effective management of energy and resources should reduce the cost of utilities. A re-examination of cleaning, catering and security contracts may reveal savings by rescheduling cleaning times, adoption of latest security techniques etc.

Whilst rent is known as a fixed cost it can vary as rent reviews take place. Similarly CILO R/rates will vary with annual changes in the Uniform Business Rate (UBR), and will be subject to five yearly ‘revaluation’ reviews. Capital Charge is an annual cost derived from the value of the property as a capital asset. The charge may vary each year as values are revised or indexation applied. Service charges are often paid on account on a quarterly basis with a reconciliation at year end.

Planned maintenance will help in minimising unexpected repairing costs.

Decorating obligations within leases are normally on 3 and 5 year cycles for external and internal work respectively.

Repairing items should be planned over a 5 to 10 year period.

Dilapidation liabilities that may arise at the end of the term should also be anticipated well in advance.
Where break clauses require the terms of the lease to be complied with prior to the operation of the break it is important to ensure that repainting and decorating is planned to comply with this. It is often the case that in order to successfully operate a break clause the tenant must be in full compliance with all the terms of the lease. Early action is required to ensure that all terms can be complied with in time to take advantage of a break clause.

What should you do?

1. Identify all fixed costs.
2. Identify variable costs and introduce systems to plan expenditure such as maintenance planning.
3. Review opportunities to reduce variable costs.
5. Plan for full compliance with lease terms to allow break clauses to be operated in accordance with the Estate Strategy and Property Plan.
STRAT 4.2 SPACE UTILISATION

The Department is recommended to carry out space audits. Records should be created and maintained in respect of net internal area (NIA) and the number of personnel within each property. Analysis facilities should be available to accurately calculate:

- the area occupied/vacant; and
- the occupational density.

As moves take place within properties the detail of changes in the number of personnel and areas occupied should be monitored and recorded.

These analysed figures should be used in monitoring performance against targets in the Estate Strategy. The figure should be benchmarked regularly against appropriate indexes. It may be useful to refer to an RICS/DETR study on occupational densities in offices entitled “Overcrowded, Under-Utilized or Just Right?”. It should be noted that professional space planners use a different method of measuring ‘occupational density’ and therefore any data relating to density standards used by space planners should be treated with caution unless the measurement method is fully understood.

When reconfiguring the working environment managers should be careful to take statutory requirements such as fire regulations into account.

**What should you do?**

1. Carry out regular space audits to update data on occupied and unoccupied net internal floor areas (NIA) and number of staff.
2. Notify PACE of any change in the occupation of space and/or space to be declared as surplus in accordance with the CEC.A.
3. Analyse data to provide utilisation records for subsequent performance monitoring against operational plan targets.
4. Benchmark.
STRAT 4.3 LEASE PLANNING

Records should be maintained and monitored in respect of lease events i.e. breaks, expiries and rent reviews. It is then possible to forward plan action to be taken when the event occurs up to 5 or even 10 years in advance. In this way it may be possible to spot opportunities to rationalise the Departmental portfolio in the future, and enable forward planning of budgets to allow for dilapidations, increasing or decreasing rents or relocation.

There may also be opportunities to agree favourable terms with landlords by making early decisions about lease renewals or non-operation of break clauses. For example, where a lease expires in say two years and the Estate Strategy can foresee remaining in occupation beyond that period, a landlord may be willing to agree a new lease for an extended term immediately, with a reduced rent, rent free period or other inducement.

A flowchart has been included here to illustrate the forward planning and option appraisal process in relation to a forthcoming lease expiry - the procedures for lease renewal, acquiring new premises or termination are summarised elsewhere in this guide.

Ensure that any ‘spend to save’ investments give a payback within the remaining lease period.

What should you do?

1. Maintain forward records of lease events and make sure that important notice dates are highlighted.

2. Review Estate Strategy in conjunction with the future lease events schedule.

3. Forward plan budgets in conjunction with future lease events.

4. Where it appears likely that the Department will remain in occupation when leases expire or breaks occur within 2 to 5 years, take advantage of the opportunities for early agreement with the landlord which could result in beneficial terms for extension or renewal.

5. Liaise with PACE. (See C E C A).

6. Where jointly occupied buildings are involved, refer to MOTO.
REVIEWING LEASE OPTIONS

2 Years Prior to Expiry Date, Premises Manager alerted to Forthcoming Lease Expiries

Property Adviser Provides Assessment of Options Available at Expiry

Option Example 1
Renew Lease

Option Example 2
Relocate to Alternative Premises

Option Example 3
Terminate Lease

Property Adviser Prepares a Financial Appraisal for Each Option

Examples of Items Usually Covered in Appraisal Include:

Rent on Renewal
Likely Dilapidation Costs
Future Service Charge or Maintenance Liabilities
Potential Relocation Costs
Potential Compensation for Disturbance/Improvements

Property Adviser Assesses Likely Impact of Each Option on:

Delivery of Services
Departmental Estate Strategy and Policies

Premises Manager Consults with Departmental Business Managers to Determine Future Operational Requirements and Seek Views on Practicalities of Each Option

Preferred Option Chosen
STRAT 4.4  FUTURE SPACE REQUIREMENTS

An essential feature of a Property Plan is that it takes account of the Department's changing needs over the foreseeable future and allows premises managers to take action to build in the right amount of flexibility and to take advantage of opportunities as they arise.

Early warning is necessary to put in place proper planning and budgeting to meet the additional space requirements. Wherever possible space in the existing portfolio should be utilised to meet requirements. Where it is clear that existing space cannot be effectively and economically adapted to meet the Department's requirements in terms of business needs, number of people, location, quality of premises and size then acquisition from outside the portfolio can be considered. It is essential that full consideration is given to use of other properties on the Civil Estate. PACE must be notified of a Department's need for extra space and can assist by co-ordinating property activities on the Civil Estate in accordance with the Civil Estate Co-Ordination Agreement (CECA) and DAO (GEN) 1/96.

What should you do?

1. Identify and plan for future space requirements early.
2. Initially notify PACE of needs for extra space. (See CECA).
3. Fully consider available space on the remaining Civil Estate.
4. Consider other appropriate space available on the open market.
5. Fully specify the requirement in terms of number of people, location, quality and size; BREEAM assessment.
6. Identify all options and select those to be financially appraised.
RATIONALISATION

The Property Plan should identify whether there is a need for rationalisation and set a programme for its achievement. In order to make the most efficient and economic use of property it will be necessary to review how best the premises can be utilised having regard to business needs of the organisation, lease structures, MOTO arrangements with other Departments, space standards, occupancy cost and release of vacant areas for disposal. Where areas can be vacated, thought should be given to rationalisation to release whole floors or parts of floors which can then be sub-let and/or where services can then be minimised. Where leases are expiring or break options are due, serious consideration should be given to the economic use of space and whether it would be possible to vacate the property and relocate to other premises in the portfolio.

If property is to be left vacant plans should be made for reducing overheads protecting and securing it and maintaining its value until disposal is achieved.

PACE has a key role in rationalising the whole of the Civil Estate and should be consulted during the process of planning rationalisation and release of space. Departments can make great savings by rationalising their property estate, but should remember that they have a duty to consider the impact of their decisions on other Departmental occupiers.

What should you do?

1. Review the rationalisation proposals in the Property Plan.

2. When opportunities arise for releasing properties such as lease expiries and breaks, consider in good time whether it will be possible to rationalise and vacate the space.

3. Where jointly occupied buildings are involved refer to DEOA and specific MOTO(s).

4. Notify PACE of rationalisation plans and release of vacant space. (See CECA).

5. If property is to be left vacant consider health and safety implications and protect and secure the property with reference to the “Code of Practice for the Protection of Unoccupied Buildings”.
NEW REQUIREMENTS

Following the identification of a space requirement which cannot be physically or economically satisfied from the Civil Estate, it will be necessary to prepare a case for relocation. The requirement should be fully specified in accordance with “Towards Sustainable Construction – Green Guide for Managers on the Government Estate” and advice should be taken internally and from PACE upon the availability of alternative space to meet the requirement. A fully costed cash flow budget should be prepared comparing suitable premises and where possible, a comparison of cost should be made with similar premises in the existing Departmental portfolio. It will be necessary to fully appraise the options available prior to reaching a final choice which will also need to include the Private Finance Initiative option. Regard should be had to annual occupancy costs, eg rent, contribution in lieu of rates (CILO R)/business rates and service charges of the various alternatives. The importance of developing a sound technical and environmental specification that takes full account of the life-cycle of the building and its future occupation cannot be over emphasised. Government policy is that when new buildings or major refurbishments are undertaken a BREEAM assessment should be undertaken. This should be regularly reviewed using the BREEAM Office update scheme.

Regard should also be had to maintaining flexibility to accommodate changes in operational requirements in the future. This may involve including tenant breaks in leases or negotiating options to expand into additional accommodation within a building if available.

New ideas

Non-traditional solutions should be considered and appraised along with more conventional property options. These include PFI, outsourcing of facilities management and the use of fully serviced offices to provide for a short term need. Total property outsourcing such as PFI should be considered as an alternative to property ownership and Government policy favours concentration on the core public service objectives and the transfer of property related risk to the private sector where appropriate.
There are, however, major companies across the world that view property as a business asset and who are developing innovative and imaginative accommodation solutions in which the sites and buildings they occupy are used as a fundamental resource in helping them achieve their business objectives. These buildings tend to support the latest ideas in flexibility and encourage high levels of communication and teamwork by using ‘state of the art’ information technology and a flexible, non-traditional working environment. To be successful in producing real and lasting improvements in productivity and efficiency these new solutions seem to require the business to address four essential ‘levers of change’:

- Corporate Culture
- Business Process
- Technology
- Working Environment

It is important that all are reviewed at the same time. While changing one or other of these ‘levers’ in isolation is likely to produce some improvements, reaping the full reward of investment in new ideas requires senior management commitment to the whole ‘vision’. To find out more about new ideas estate managers should keep abreast of industry journals and consider joining ‘networking’ groups which organise events to encourage the spread of ideas on new ways of working.

Further guidance on space planning is included later in this Guide.

**What should you do?**


2. Check that advisers and professionals have the necessary technical and environmental expertise. Consider using the DETR/BRE Design Advice Service.

3. Liaise with PACE in accordance with CECA.

4. Take advice upon availability of premises from property advisers. Locations considered should accord with Government’s ‘Green Transport’ plans.

5. Consider PFI, outsourcing, serviced offices and other non-traditional accommodation solutions.
STRAT 4.7  SPACE PLANNING

Departments must ensure that property is designed, planned and maintained to meet all statutory health and safety and environmental requirements. In planning space the requirements of the Workplace (Health, Safety and Welfare) Regulations 1992 which derive from the Health and Safety at Work, Etc Act 1974, the Health and Safety (Display Screen Equipment) Regulations 1992 and other appropriate standards should be followed closely. Departments should refer to the PACE publication ‘Requirement for Office Buildings’ (ROB). Where Departments do not have their own in house specialists they are recommended to take advice from professional space planning consultants who are also experienced in environmental issues.

When planning space for personnel, allowance should be made for access to communal facilities required to carry out work efficiently and effectively, eg meeting and file rooms.

After identifying suitable property, the first step is to develop an internal layout. Points to note are:

- size and shape of the property;
- business requirements;
- information technology (existing and future requirements);
- flexibility; and
- future expansion.

In planning the space the following should be considered:

**Primary circulation**

Allow for walkways approximately 1.5m wide running between exits to provide escape and general access routes.

**Zones for enclosed space**

Try to plan in a modular fashion, bearing in mind that planning is an ongoing process; synchronise partitions with building/services planning grids; break up partition runs to allow views out of and light into open plan areas.
Open plan areas generally

Try to maximise access to primary circulation routes; locate desks and tall storage units at right angles to sources of natural light wherever possible; try to achieve an even density of workstations in floor layouts.

Space saving

When space is under pressure try to minimise filing areas, eg consider external storage, combine meeting rooms with training rooms, take out low usage workstations and consider ‘hot desking’ (staff who work away from the premises for the majority of their time can share) and locate managers in open plan areas adjacent to meeting rooms. This last may, depending on individual circumstances, aid team building, communication and improve the effectiveness of the unit. Consider also a variety of types of meeting and work spaces to suit existing and anticipated working patterns.

The following gives the planning sequence:

Property Capacity and Services

Assess the property in terms of:

• total area, less core areas - ie those areas containing lifts, lift lobbies, stairs, plant rooms, risers, lavatories and any enclosed area that connects the lifts and these facilities, and the primary circulation routes;

• taking into account the shape as well as the size of the floors;

• working out the primary circulation routes; and

• lighting layouts and power, data and voice services.

What is of value here is continuous, uninterrupted internal area that allows for flexibility in the planning and management of space through time.
Zoning Options

Onto the basic plan of the property, it is now possible to plot options for the size and location of the various parts of the organisation. For this, it is necessary to know how many staff there are and what functions they will be performing. Consideration must be given to criteria for:

- public access;
- staff communication;
- team/individual working patterns;
- future flexibility;
- security;
- health and safety including fire precautions.

Internal layout and organisation can contribute significantly to the way individuals feel, to the efficiency with which processes can be carried out and hence to overall productivity. It is important to analyse working patterns and business processes in order to provide the right types and mix of environments within the workspace. This is a complex area and there may be many options available. These should be evaluated with the assistance of the users taking advice from the appropriate professionals.

Block Layouts

At this stage it will be helpful to have the dimensions of the property on a Computer Aided Design (CAD) system in order to explore possible planning solutions. Already known are core areas, primary circulation routes and a rough idea of where each part of the organisation will go in relation to the others. The idea with both the zoning and block stages is to plot simple zones signifying sections or areas, rather than actual detailed desk plans; in this way the relationship of different parts of the organisation can be established before getting down to actual desk positions. Again it must be stressed that consultation with the users at these stages is crucial, both for the purposes of general communication and for ensuring that the final result is genuinely what users want.
Generic Floor Layouts

This is the final stage of planning and involves producing scaled floor plans showing the layout of all workstations, support areas, partitions, tea points, positioning of photocopiers, etc. These plans can then be used to provide information eg for cabling specialists. After further consultation with the users, these layouts will provide the absolute final plans for the actual moving in or moving around to create a flexible working environment.

What should you do?

1. Be aware of the role of effective space planning in maximising business performance

2. Use space planning at the appropriate stages of reorganisation, refurbishment or acquisitions and take advice from specialist consultants.

3. Involve users at all stages.
The Property Plan should identify property goals, financial and environmental targets and Departments will need to monitor and measure performance with a view to controlling costs, improving efficiency and environmental performance, maintaining quality and demonstrating value for money.

Performance management should relate to both the financial, environmental and physical characteristics of the property and the service provided by property advisers. Measurement needs to be both quantitative ie financial, environmental and physical, and qualitative ie relate to standards and value. By setting key performance indicators (KPI) based upon core characteristics and processes, and benchmarking these against similar properties and services, it is possible to provide a management process which can analyse the performance of properties and services against original targets, DETR guides and industry standards. This provides valuable information to support strategic and operational decisions. Ideally performance management should be geared to a process of continuous improvement from the property and the management service.

The performance management process involves:

- analysing the physical, environmental and financial characteristics of the property portfolio and the management service;
- identifying KPIs some or all of which can be externally benchmarked;
- setting targets which are realistic, challenging and meet Government objectives (ie 20% reduction in energy use);
- collecting and monitoring data;
- regularly reviewing the overall performance by use of KPIs and external benchmarking; and
- reporting to senior management.

**What should you do?**

2. Take professional advice.
PERFORMANCE INDICATORS

Performance indicators can be established for any aspect of performance that is measurable. However it is important to identify core characteristics and processes where performance is variable and controllable. Variations in these areas will have the greatest impact on performance. KPIs in respect of the physical property include:

- **Space utilisation**
  - Space per person
  - Percentage voids

- **Occupancy costs**
  - Cost per square metre
  - Cost per person
  - Target savings
  - Energy consumption per square metre
  - Water consumption

- **User satisfaction**
  - Customer satisfaction
  - Working environment standards

- **Environmental**
  - Energy
  - Water
  - Volatile Organic Compounds (VOCs)
  - Ozone depletions
KPIs in respect of the property management service will include:

- Financial
  - Savings against budgeted payments
  - Improvements in income
- Non-financial
  - Speed of response
  - Time taken to complete task
- Quality of service
  - Use of innovative ideas

Performance measures should also be established to monitor progress on individual strategic and operational initiatives eg refurbishment schemes, relocations, acquisitions and disposals, etc.

It is important to establish programmes with key targets and critical success factors in order to monitor progress against key time, cost, quality and environmental criteria. In particular, it is important to identify cost increases, time overruns and compromises on standards and/or operational requirements as early as possible in order to assess implications and take corrective action.

What should you do?

1. Analyse information and, using benchmarking to compare one building with another, set realistic and achievable targets.
2. Monitor and review KPIs regularly.
4. Seek continuous improvement in all key areas.
STRAT 5.2  

**BENCHMARKING**

A key element of effective property planning and performance management is comparison across the portfolio and with external indicators. This **benchmarking** process is utilised in establishing whether targets are realistic and challenging and measuring the success of outcomes.

There are numerous definitions of **Benchmarking** but in simple terms it is the structured process of comparing processes and activities with others and establishing a range of standardised measures which can then be compared on a regular basis. It should be seen as an ongoing process, not a goal in itself or just a one off exercise.

Performance should not be measured in isolation and comparison with other **Departments** or private organisations undertaking similar property management processes provides a useful best practice guide to the success of management methods.

It is worth concentrating initially on core activities and processes, as those potentially offer the greatest benefit from **improvement**. As part of the process it will become possible to identify where investment of resources to achieve improvement will offer the best return. The **benchmarking** scheme can be expanded gradually to include more indicators and external **benchmarks**.

When using external **benchmarks** there is a real need to ensure that the method of measurement of those **benchmarks** is the same as that used internally. Standardisation of measurement is the key to successful comparison. Externally comparison can be achieved by:

- Purchasing published information;
- Reference to **DETR** and **BRE** guides on energy consumption in offices;
- Subscribing to data exchange services;
- Joining benchmarking clubs;
- Independent audit;
- Adopting a combination of the above.
Benchmarking can be applied to a range of performance indicators including physical characteristics and energy consumption of the property and the management services provided. They can be both financial eg occupancy costs per person and non-financial eg time taken to dispose of surplus property. It is important to understand what external benchmarks are available when initially setting key performance indicators in order that these may be applied during the performance management process. They should also accord with Government’s “Model Policy Statement for Greening Government Operations”.

Property data can vary considerably depending upon location, type, size, height and facilities and it is vital for the purposes of comparing like with like to fully understand what is being compared.

**EXAMPLES OF BENCHMARKS**

**Physical**
- Percentage of floor space according to type and use
- Full time employees per square metre
- Vacancy rate
- Car spaces per square metre/employee

**Environmental**
- Energy consumption per square metre
- Water consumption per employee
- BREEAM assessment
- Percentage electricity from renewable sources
- Number of contracts amended to exclude peat and pesticides
- Reduction in use of ozone depleters
- Number of cleaning and catering contracts specifying non-hazardous substances
Financial

- Total property costs per square metre/employee
- Net rental costs per square metre/employee
- Rates per square metre/employee
- Service charge per square metre/employee
- Repair costs per square metre/employee
- Other occupational costs per square metre/employee
- Total occupational costs per square metre/employee
- Over/under renting
- Capital costs per square metre/employee
- Dilapidation settlement/square metre

Management Service

- Rent review performance
- Rating appeal performance
- Management costs per property
- Management staffing levels
- Rent collection and bad debts
- Marketing time of surplus property

What should you do?

1. Ensure quality and relevance of database information.
2. Seek advice from property adviser PACE on introduction of 'Benchmarking' and on external data available.
3. Contact CAU for information on activities of other Departments.
IDENTIFY AND IMPLEMENT ‘BEST PRACTICE’ IN MANAGING PROPERTY

NEEDS GOOD MANAGEMENT INFORMATION
- management information must be relevant, timely, accurate
- use this structure to support your forward financial planning
- identify and adopt Performance Indicators, identify goals and money targets
- move ‘culture’ towards accepting Best Practice as the norm
- monitor to demonstrate VFM
- adopt appropriate Benchmarking, look to organisations for PIs

USE PERFORMANCE INDICATORS AND BENCHMARKING TO EFFECT IMPROVEMENTS IN PROPERTY PERFORMANCE

USE THE OUTTURN DATA FROM THE MANAGEMENT INFORMATION SYSTEM
- identify reasons for good or poor performance
- identify controllable and non-controllable variables
- adopt best practice management of controllable variables at all sites
- adopt a longer-term policy to move away from properties affected by adverse non-controllable variables
ACQUISITIONS
**ACQ 1.0**  
**GENERAL**

The decision to acquire premises should form part of a strategic process including consideration of the Estate Strategy, the Property Plan and reference to the needs of the business. It is generally the case that operational solutions are cheaper than premises solutions.

**Acquisition** proposals should be fully supported by:

- business case prepared in accordance with HM Treasury’s “Appraisal and Evaluation in Central Government (The Green Book)”;
- review of options;
- financial appraisals;
- valuation report;
- BREEAM assessment.

There should be liaison with PACE in accordance with Civil Estate Co-Ordination Agreement (CECA). Full consideration should be given to surplus space available within the Department’s portfolio and the rest of the Civil Estate.

Managers should ensure that, in any acquisition process, they follow Government policy and Greening Government initiatives.

The following section deals with the principal factors in the acquisition process from property search through to completion of legal formalities. This section also includes preferred lease terms which should be considered when negotiating an acquisition. For information on lease covenants and definitions refer to the General Estate Management section.

**What should you do?**

*(see over)*
What should you do?

1. Refer to the Department’s Estate Strategy.

2. Liaise with PACE in accordance with Civil Estate Co-ordination Agreement (CECA).

3. Consider surplus space in the Department’s own portfolio and the rest of the Civil Estate.


6. Follow BSRIA “Environmental Code of Practice for Buildings and their Services”.

7. Consider using DETR’s or the BRE ‘Design Advice’ service for projects involving new build or major refurbishments.
ACQ 2.0  SELECTION

ACQ 2.1  IDENTIFYING REQUIREMENTS

Additional premises requirements can arise from a variety of reasons including Departmental strategy re-organisation, changes in Government policy or simply the expiry of an existing lease. This may be a short term requirement, necessitating temporary premises or a more long term demand.

Once identified, those requirements should be referred to PACE whose main roles are twofold: firstly, in its ‘Rationalisation’ role, where there is existing surplus property on the Civil Estate PACE can be considered as potentially satisfying the requirement (having regard to CECA) and secondly, in its ‘Coordination’ role PACE can ensure there are no conflicts arising between Departments. It is vital that, unbeknown to each other, two Departments do not bid against each other for one property, with the possibility of raising the price that might otherwise have been payable.

Most acquisitions will be in the name of The First Minister for Scotland, although for Departments with a headquarters in England or Wales they will be in the name of the Secretary of State for the Department of the Environment, Transport and the Regions (DETR).

An acquisition may have to be supported by an economic case made to the Treasury before it can proceed. Reference should be made to the Treasury’s “Appraisal and Evaluation in Central Government (The Green Book)” and the DETR’s “Towards Sustainable Construction - Green Guide for Managers on the Government Estate”. The Department should consider all options including PFI in all property acquisitions.

What should you do?

1. Refer any requirement for additional premises to PACE.
2. Consider all procurement options including PFI.
Prior to appointing property advisers to carry out a search for a suitable property, it is necessary to prepare a brief setting out the parameters for the search.

The factors that should be addressed in defining the Brief should include:

- the numbers of staff to be accommodated and/or space requirements (usually expressed as a size range);
- the likely longer term space requirements - eg the volumes and patterns of occupation;
- specification of specific features required - eg naturally ventilated and lighted, low operating costs with energy consumption of 80 kilowatt hours per square metre/per annum, rainwater cisterns constructed using recycled materials, adjacent public transport node, brownfield site, disabled access;
- security requirements;
- location - what is the general area of search (with an indication of any special needs), is the specific location of primary or secondary importance and does it accord with the Government's Green Transport Plan?
- an estimation of the budget - what price/rent/service charge is a Department prepared to pay, what are the direct operating costs, what are the costs of ingoing services and professional fees, does the balance of capital and rentalised costs suit the Department's budget?
- programme - an indication of when the space is required.

The Specification of Requirement, or User Brief, should be ‘output driven’ so as not to stifle innovative proposals. This is particularly the case in the PFI scenario which should also include opportunities to achieve continuous improvements in environmental performance. There may be some instances where an output specification needs to be modified because of specific Government standards which are expressed in ‘input’ terms, but these are likely to be rare.
As early as possible Departments should determine whether their proposals are covered by the EU legislation on procurement. If it is then an advertisement requesting expressions of interest in providing a PFI or PDS solution should be placed as early as possible in the Official Journal of the European Community (OJEC). Advertisements placed must be sufficiently general so as not to inhibit innovative solutions and the potential degrees of freedom against which the private sector can respond. Further guidance on EU procurement legislation is contained in the PACE “Guide to the Appointment of Consultants and Contractors”.

What should you do?

1. Appoint property advisers to carry out the search.

2. Set out a clear brief to the property advisers and establish whether it is realistic in the light of the current market.


4. Refer to GACC for guidance on the legislation surrounding procurement.
THE SEARCH

Having received a brief the appointed property advisers will commence their search for properties or other accommodation solutions that meet the Department’s requirements. In respect of PFI it may be necessary to appoint specialists with experience of this field. PACE can assist through its PPP/PFI group. Although the Search will differ in every case, depending on the brief, it will generally cover the following sources:

- the property advisers’ database;
- any properties available through other property advisers in the area of search;
- large occupiers in the area which may have surplus space;
- local authorities;
- institutional property owners; and
- large private property owners in the area.

In its initial stages the search should cover as wide a range of properties as possible to ensure that no potential solutions are missed. From this ‘long list’ a ‘short list’ of serious options can be assembled.

In the context of a PFI solution in response to expressions of interest, an information pack should be assembled to include the following items:

- background to the project;
- a summary of the User Brief;
- any other properties, particularly vacant ones, that can be used by the private sector in developing a PFI solution; and
- an indication of whether a publicly funded alternative to PFI exists and where appropriate, some description of the proposed public sector option.

This last point will be important in providing to prospective bidders the opportunity to come forward with alternative proposals which might offer better value for money and improve environmental performance.
Having identified potentially suitable solutions the property advisers will report to the Department on options and further investigations. At this stage the Department should liaise with PACE in accordance with CECA. The ‘Report on Options’ is dealt with in the next section of this chapter under ‘Procurement Options’ together with summaries of the various options available to Departments to satisfy their need for new accommodation.

From amongst the various options revealed by the search process a range of suitable alternatives will be identified. The Department should inspect properties and commission surveys, valuation reports, legal investigations and BREEAM assessments to establish probable life cycle costs in order to carry out ‘Option Appraisals’ in accordance with HM Treasury’s “Appraisal and Evaluation in Central Government (The Green Book)” on potentially suitable properties. Other accommodation solutions not based on property ownership should also be appraised and evaluated.

If the result of the appraisal is to conclude that a traditional property solution offers the best value to the Exchequer then the property search will continue having been narrowed down to a ‘short list’. The Department should instruct its advisers to commence negotiations on terms. In order to keep options open and maintain a strong negotiating position the Department should view several properties seriously and pursue negotiations in parallel. The professional advice team, including property advisers and legal advisers, should draft the desired terms and conduct negotiations with each of the owners. The negotiations regarding price should only be concluded after the other terms and conditions have been agreed.

During inspections the Department should only send the minimum number of people necessary. They should refrain from commenting either negatively or positively, although they may ask factual questions. Any expressions of interest in the property to the owner’s agent are likely to undermine the property advisers’ negotiating position and worsen the terms on which the property can be acquired.

What should you do?

1. Liaise with PACE or other sources for potential properties or advice on PFI.
2. Ensure that advisers have the necessary experience, technical and environmental expertise.
3. Ensure that all options are appraised and evaluated at the appropriate time.
PROCUREMENT OPTIONS

A description of the main aspects, advantages and disadvantages of feuhold and leasehold properties and those held on ground leases can be found in the Estate Management section.

The following pages concerning acquisition include preferred lease terms in the case of leasehold acquisitions, and the other procurement options open to the Department. These include both the Private Finance Initiative (PFI) and Private Developer Schemes (PDSs).

The objective of PFI is to secure the best possible value for money for the taxpayer through the involvement of the private sector in the delivery of services to or on behalf of the public sector, where the delivery of these services involves a significant capital expenditure.

Private Developer Schemes differ from Crown Build schemes in that normally, the Crown takes a lease of the completed development, whilst having an input on the design and specification of the building.

Some new ideas on the provision of ‘working environments’ being used to promote business objectives are outlined in the Strategy chapter of this Guide.

Whatever procurement option is followed, Departments should bear in mind the requirements of EC procurement legislation and the need to advertise in the Official Journal of the European Community (OJEC).

EC Procurement rules and procedures are outlined in the PACE “Guide to the Appointment of Consultants and Contractors” (GACC).
Once the search has been carried out the appointed property adviser will provide a report to the Department on all the properties which fit the brief. This might contain feuholds, leaseholds and private developer schemes (PDSs). Due account should also be made of the possibility of using PFI or PPP to meet the Department's needs.

The report must contain complete details of all the properties including size, full specification, acquisition terms and costs in use. The report should also advise on the individual merits and disadvantages of the various options. Further guidance is given later in this chapter. The property advisers instructed to carry out the search will arrange inspections of those properties of interest and will be able to carry out any further researches that arise from the inspections.

Where PDS or PFI is suggested the property adviser will need to quantify any risk transferring PFI proposals. The PDS or PFI proposal must offer the genuine transfer of risk to the private sector. Without risk transfer, such arrangements would be no more than a finance lease and would not offer value for money. Departments should refer to Treasury guidance in “The Green Book” and Taskforce publications.

In order to seek best value for money, the commercial terms of a PFI contract should be guided by the following:

- minimising overall project risk, eg. avoiding the introduction of artificial or unnecessary risks;
- ensuring that inherent project risks are allocated to the appropriate party.

The areas of potential risk transfer can include:

- planning and site acquisition risk;
- design risk/construction risk;
- management of decant from existing buildings during redevelopment;
- dispersal of existing feuhold/leasehold;
- operational risks and facilities management;
- consequential risks;
- capital costs of achieving Government energy reduction targets; and
- occupancy risk.
When investigating the options there will be a need to make further investigations into:

- structural survey;
- direct operating costs;
- space planning;
- BREEAM rating; and
- town planning.

What should you do?

1. Make inspections of those properties of interest, noting the adviser's recommendations on any disadvantages or drawbacks.

2. Carry out Option Appraisals of each suitable alternative.
Leasing an Existing Building

Leasing an existing building remains one of the most common methods of acquiring workspace.

If the requirement is for office space there are usually a sufficient number of new or second-hand premises on offer in the market at any time to enable several suitable examples to be selected from which to make a final choice.

Because of the usually strong demand and its non-specialised nature office property is popular amongst investors and developers. It is common for developers to build speculative office developments in popular locations and these are likely to be advertised prior to completion. Procuring a pre-letting may enable the prospective tenant to influence the fitting out of its space during construction. Once let these buildings are often purchased by investors, eg insurance companies or pension funds, who may own a large portfolio of similar properties for investment purposes. These landlords are therefore primarily interested in the level of return on their investments by way of rent and capital growth. Property advisers should be aware of the landlord’s likely concerns when negotiating lease terms.

As an alternative to acquiring a new lease it may be appropriate to consider the acquisition of an existing lease through assignation. The existing lease terms and terms of assignation should be carefully considered with advice from property and legal advisers.

As part of an option appraisal considering the need for workspace acquisition it may be appropriate to consider renewal of an existing lease. Lease renewal is similar to acquisition of a new lease. Further detail is given elsewhere in this Guide. Property advisers should be consulted wherever lease renewal is being considered.
Some advantages of leasing workspace are:

- the space is usually ready to occupy although occupiers will probably need to fit out internally to their own specification;
- through negotiation the lease terms can be tailored to meet the occupier's predicted needs;
- at the end of the term or at a break point the occupier has the opportunity to leave (subject to provisos explained in further detail elsewhere in this Guide);
- leasing a building will not usually require a large capital payment at the outset. An annualised rental is often more compatible with an occupier’s income stream; and
- the workspace can usually be acquired and occupied within a relatively short time of the need arising.

There may also be some disadvantages attached to leasing workspace and these should also be considered in the option appraisal. Some of these disadvantages are:

- choice may be limited due to lack of supply in the market at the time the need arises;
- a landlord may offer terms that do not quite meet the prospective occupier's needs, but which, for a variety of reasons, the prospective occupier may be obliged to accept;
- a lease places restrictions on what an occupier may do with or in the premises;
- an occupier's needs may change over time so that restrictions in the lease become onerous;
- an occupier may find that it no longer has a need for the space, but remains responsible for it until the expiry of the term or lease-break unless the lease can be assigned to a new occupier or surrendered; and
- at the end of the term there is no right for an occupier to be granted a new lease. If a new lease is not granted, an occupier is not entitled to any compensation.
The process of negotiation should build on the advantages and minimise the impact of the disadvantages mentioned above. The terms agreed will have a profound effect on how well the workspace fulfils the occupier’s business needs and whether, in the longer term, the lease remains an asset or becomes a liability.

The section of this Guide relating to Heads of Terms contains a summary of Key Issues that should be considered when leasing workspace and which will be included in almost any lease. Each Key Issue is discussed and guidance offered suited specifically to the Government occupier.

In spite of certain disadvantages leasing an existing building is often the best way for a Government Department to satisfy its workspace needs, although increasingly Departments may look to alternative arrangements such as PFI or other forms of serviced workspace provision that have become available in recent years. These options are discussed elsewhere in this Guide.

Within the Civil Estate there are already many leased buildings. Leasing is a complex subject that premises managers should become familiar with in order to be able to instruct their property advisers effectively. Consequently a large proportion of the Estate Management section of this Guide is devoted to lease requirements and how to deal with them. Similarly the Disposal section contains guidance on how to go about disposing of a lease when the workspace is no longer required.

What should you do?

1. Consider leasing an existing building as one of the options in appraisal.

2. Take advice from property and legal advisers with the appropriate professional experience.

3. Formulate your requirements clearly in relation to Heads of Terms having regard to your Department’s business plan and the estate strategy. This will help your property advisers during the search and appraisal process and later when negotiating terms with a landlord.
ACQ 2.4.3  **Developing a Feuhold Site**

Where existing premises are unable to meet the requirements of the Department or the use is of a specialist nature requiring purpose-built premises it may be necessary to purchase a site on which to carry out a development.

A number of factors need to be carefully considered in the selection of sites for development including:

- size of site to meet the requirement;
- suitability of location ie Brownfield Site;
- likelihood of achieving planning consent on the site for the desired use. Planning approval should be obtained prior to purchase;
- suitability of ground conditions for the proposed building together with any contamination issues. A site investigation should be carried out prior to purchase;
- cost profile of the site in being able to economically support the proposed building ie transport facilities.

The development of property is a highly complex process needing the input of a wide range of specialist advisers. Some of those specialist skills will be required for the purchase of a site and to ensure that it is capable of meeting the Department’s requirements. The Department will require advice on the physical ability of the site to take the development. Having gathered this information a full appraisal can be carried out prior to a purchase being negotiated. Consideration should be given to any future abnormal cost implications.

**What should you do?**

1. Instruct property advisers, with the necessary technical and environmental expertise, to undertake a feasibility study of the project.


3. Consider the findings of the feasibility study.

4. Obtain planning clearance.

5. Consider the necessity of the appointment of a project manager.
Development Options

In considering the purchase of a site for development a professional team will need to be employed to advise upon the suitability of the site to meet requirements, the feasibility of the development and the options available.

The principle options to be considered include:

- direct development by the Department - this will involve the Department employing professionals including a project manager, entering into direct contracts with building contractors, through to completion. The Department retains all the risks in the development;

- employing a developer to act as a project manager - this option involves agreeing a percentage fee with a development company to provide a full project management service including the appointment of the professional team. The Department retains all the risks in this development option;

- joint development - this will involve entering into a joint venture arrangement with a developer. In this option the costs of the development are shared between the parties and the developer carries out the development. At completion of the development the parties become joint owners of the property and the Department enters into an occupational lease with a rental sharing arrangement by the joint venture vehicle dependent upon the percentage investment made by each party. The parties share the risks of the development;

- sale and leaseback - in this arrangement a developer will be brought in to purchase the site, carry out the development to the occupiers’ requirements and grant a lease to the occupier on agreed terms. This is commonly referred to as a Private Developer Scheme (PDS) and is an example of a Public/Private Partnership (PPP). A development agreement is entered into which includes a forward leasing arrangement prior to a development taking place. The developer takes on the total risk of the development;

- Private Finance Initiative (PFI). PFI is an extension of the PDS option. In this arrangement private sector developers, financiers and service providers usually form a team to provide a building, maintain it and provide all the occupiers’ building service requirements over a long occupation term in accordance with the occupiers’ requirements. The price is fixed in advance and the private sector carries the risk of providing the requirement. In PFI solutions the primary purpose of the risk transfer is to provide incentives to the private sector developer/landlord to use good management to reduce the risks that are within their control. In addition it places responsibility for design and ongoing operations in one place, this then provides an incentive to optimise the trade-off between different components of the whole life-cycle cost of service delivery.
It will be necessary in all options to appoint a professional team to act on behalf of the Department. PACE can advise, and its PPP/PFI group can provide advice on the appropriate make up of the professional team and on the way PDS/PPP/PFI proposals are generated.

The DETR and the BRE operate the 'Design Advice' service which offers professional, independent and objective advice on energy-efficient and environmentally conscious design of buildings – including refurbishment. Eligible projects can receive a free consultation. Departments should comply with the recommendations of the 'Green Code for Architecture' and Government environmental policy.

What should you do?

1. Appoint a professional team, with appropriate technical and environmental expertise, to advise upon suitability, feasibility and the options available. Consider consulting PACE through your local regional office.

2. Fully consider all options available and understand the risks, costs and funding arrangements.

3. Consider using the DETR/BRE ‘Design Advice’ service.


PROCUREMENT OPTIONS

ACQUISITIONS

SELECTION

INTRO 2.2
Private Finance Initiative (PFI)

The Private Finance Initiative (PFI) is a government policy initiative designed to increase the role of private sector finance in the provision of public services.

Property Planning and PFI

PFI is one of a number of options available to Departments in the provision of services to the public. This will be the case whether Departments are reviewing their Estate Strategy or where they have identified a new property requirement. Other options will include conventional public sector financed solutions.

The PFI method of procurement can be used for new accommodation or for dealing with existing properties, either singly or in complete portfolios. The ‘PRIME’ project, which produced a PFI solution for the whole of the DSS portfolio, included the private sector partner taking on the responsibility for the existing DSS property portfolio, including both feuhold and leasehold interests. A National Audit Office report on “The PRIME Project” is available for reference.

Background

The Private Finance Initiative was announced by The Chancellor in his 1992 Autumn Statement. The Treasury issued a consultation paper in September 1993 and a Private Finance Panel was set up to promote the flow of private finance projects. The requirement to explore private finance options for all projects requiring Treasury approval was formalised in guidance issued by the Treasury to Departments in January 1995 entitled “Private Finance Initiative and Approval of Capital Projects – Guidance for Departments”.

On taking office in May 1997, the Labour Government embarked on a review of the operation of the PFI, with the objective of speeding up progress in projects required by the public sector. “The Bates Review” reported in June 1997 with 29 recommendations designed to streamline decision-making and procurement procedures, particularly in the public sector. The creation of the Treasury Taskforce was central to the implementation of the Review recommendations and provided a focus for policy and project advice.
**PFI Objectives**

The PFI initiative is intended to deliver higher quality and more cost effective public services through the injection of private sector investment and practice into infrastructure and services normally provided by the public sector. PFI encourages partnerships and joint ventures between public and private sectors.

There are only two fundamental requirements for a PFI project:

- The private sector must genuinely accept a transfer of risk;
- Value for money must be demonstrated for any expenditure by the public sector.

This does not mean, however, that the private sector must bear all the risk. The aim should be to seek to minimise total project risk by placing those risks with the party best placed to manage them.

**PFI Guidance**

The Treasury Taskforce issues guidance upon the use of PFI solutions. The most recent guidance has three main objectives. These are first, 'to promote a common understanding as to what risks are included in a PFI project'; second, 'to allow consistency of pricing across a range of similar projects'; and third, 'to reduce the time and costs of negotiation by enabling both sides to agree a range of areas that can follow the standard approach without extended negotiations'.

The guidance recognises that even standard drafting will rarely be imported wholesale into a contract without any amendment. Both for this reason and because the issues in many PFI transactions are complex, the guidance states that 'it is essential that the public sector appoint suitable advisers and that both the public sector and its advisers use the guidance intelligently on projects. ...Use of the guidance is no substitute for a full and thorough consideration of all the issues in a project'.

It is also important that Departments continue to work with the relevant private finance units and Treasury Taskforce when considering a PFI approach to a project. The Bates Report recommended that the Taskforce should approve the commercial viability of all significant projects before the procurement process commences.
**PFI Mechanisms**

In its document entitled “Partnerships in Prosperity” (November 1997) the Treasury Taskforce identified three basic PFI mechanisms currently in use:

- **Sale of services to the public sector.** To date, this has been the primary focus of PFI. The private sector assumes responsibility for the upfront investment in capital assets and the public sector pays only on delivery of the services to specified quality standards.

- **Financially free-standing projects.** These are where the private sector designs, builds, finances and operates an asset, recovering costs directly from the private sector rather than from a public sector users.

- **Joint ventures.** These are projects where the costs of development are partly subsidised and are, therefore, not entirely passed on to the end-users through annual charges.

Recent Taskforce guidance asserts that the majority of PFI transactions at present are structured in the following way. First, the private party contracting with the public sector is normally a ‘special purpose vehicle’, with subcontractors providing the actual performance on its behalf. Second, it is common for projects to involve a development or construction phase followed by an operational phase during which the full service is provided. Third, projects are normally wholly or partly financed by limited recourse debt. For up to date information on the latest Taskforce publications consult the website on http://www.treasury-projects-taskforce.gov.uk.

**PFI Contract Principles**

The recent Treasury Taskforce guidance referred to above sets out in great detail a ‘balanced approach to dealing with the key issues that are likely to arise in a wide range of PFI projects’. It also gives examples of suggested contract drafting on these points. Three of the key issues which it draws particular attention to are as follows:

1. The substance of a PFI deal should be the procurement of an efficient and effective service.

2. The pricing and the payment mechanism is at the heart of the contract as it puts into financial effect the allocation of risk and responsibility between authority and contractor. It determines the payments the Department makes to the contractor and establishes the incentives for the contractor to deliver exactly the services required in a manner that give value for money.
3. **Performance monitoring** is an essential part of any PFI contract. The contract should set out clearly the required service levels and environmental performance through output requirements i.e., the service standard required, rather than through prescriptive inputs i.e., how the service is delivered.

In the first and most common of the three PFI mechanisms noted above, the contract would specify the duration of the agreement and a service commencement date and the Departmental occupier would agree to pay a figure (the ‘**Unitary Charge**’) to cover both the cost of occupying space and receiving facilities and management services for the term of years agreed. The duration of the agreement will depend on Departments’ service requirements, the economic life of the assets involved and their potential alternative uses and financing. Given the pace of change in technology Departments will (subject to financing requirements) wish to consider the desirability of shorter contracts and/or contracts which permit changes to the level of service, further improvements in performance, i.e., energy consumption reductions and the possibility of early termination or extension.

It is important that the contract should clearly distinguish what constitutes ‘availability’ of a service and no payments should be made until the service is ‘available’. In the case of office accommodation, for example, this would include not only the provision of the accommodation itself, but also the appropriate levels of light, heat and access. Unless ‘usage risk’ is transferred, the Department will be liable to pay for the service if it is ‘available’, even if it is not used.

The private contractor would, in return for the promise to pay the Unitary Charge, take on full responsibility for the provision and management of the accommodation, including the maintenance and replacement of plant, machinery, equipment, fixtures and fittings e.g., the contractor would, inter alia, take on the **risk** of assessing what will need to be replaced during the duration of the contract, when it will need to be replaced and at what cost. In order to do so he would usually include an allowance in the Unitary Charge for the provision of a sinking fund.

Performance monitoring of the service is critical to the success of the solution and setting the performance level is the key to this. The contract should therefore set out the level of performance required, the means by which the Department is able to monitor the performance of the contract and the consequences for the contractor of a failure to meet the required level. **Benchmarking** by reference to average performance levels from similar providers will be a useful way of establishing required quality and price.
Availability of the service to the required standard will determine the maximum possible level of the Unitary Charge. Payment of such maximum will be conditional upon the quality of the performance of the service. The private PFI contractor (and his financiers) will wish to ensure that the performance level required is reasonable and objectively measurable, that the Contractor has a reasonable chance of achieving the maximum possible Unitary Charge and that the probability of the Unitary Charge dropping below a level which allows repayment of debt and payment of an equity return, is acceptably low.

PFI contracts also need to consider many other issues, such as payment mechanisms, price variations, insurance and dispute resolution. These are all addressed in recent Taskforce guidance. It should also be remembered that the rules of competition apply to the procurement of private finance under EC regulations.

**What should you do?**

1. When considering acquisition options have regard to the possibilities of utilising PFI schemes in achieving the Department's objectives.

2. Take advice from PACE PPP/PFI group through your local Regional Director's office, or other suitably qualified property advisers.

3. Subject suitable PFI schemes to the rules of competition.

4. Consult published guidance such as “Private Finance Initiative in Government Accommodation”, “Partnerships for Prosperity” and other Treasury Taskforce publications. The Taskforce should be consulted for more specific guidance as appropriate.
Private Developer Schemes (PDSs)

Private Developer Schemes are pre-leasing arrangements whereby the Crown and the private sector agree on the construction or development of a building to an agreed size and standard. The future occupier is able to have an input into the design requirements of the proposed building or development and on completion will take on a lease at a rent which has been fixed in advance.

PDSs are useful because they enable the future occupier to have a building designed largely to meet their own requirements without becoming involved in the capital investment and risk of a construction project. The investment risk element is carried by the developer/landlord who has the security of a pre-let. Care is needed to ensure that the deal agreed provides value for money and that the building is delivered in accordance with the agreed design.

The following should be considered:

- PDSs are subject to the rules of competition under EC regulations;
- all normal lease terms apply together with special terms relating to the construction and design process. For guidance on lease terms, including those specifically relevant to PDS see ACQ 2.6;
- the developer/landlord should deliver in accordance with the contract. This may also include ‘fit-out’. Monitoring of the contract is important in order to ensure the Department’s requirements are being met, subject to approval of variation;
- the developer/landlord should guarantee the performance of the building both at the handover and subsequently for the length of the lease and be responsible for any defects to be rectified, up to a maximum period of twelve years after the building is completed; and
- a lease clause guaranteeing the rectifying of any defects, with set-off against payment of rent/service charge for example, should be considered, and/or collateral warranties from sub-contractors taken so as to further guarantee that rectification work is carried out.
**What should you do?**

1. Appoint a professional team with appropriate technical and environmental expertise to advise upon suitability, feasibility and the **options** available in accordance with HM Treasury's "Appraisal and Evaluation in Central Government (The Green Book)".

2. Fully consider all **options** available and understand the risks, costs and funding arrangements.

ACQ 2.4.7

**Temporary Premises**

The Department’s requirement for extra space could be short-term and better met by temporary premises. This will avoid the potential burden of surplus space to be disposed of once the initial requirement has passed.

It is frequently possible to take a short-term hiring for this purpose. The property will usually be one that the landlord has not been able to let either due to a poor market or to a degree of obsolescence. Faced with this situation, landlords are amenable to allowing short-term occupation to relieve their obligation for property rates provided the lease does not provide security of tenure for the tenant. The landlord may also require the inclusion of a break clause operable by the landlord in the event of a longer term tenant being secured. Any repairing obligation should be limited by a schedule of condition at the start of the lease.

Serviced premises are an alternative to a short-term hiring. It is property that is fully fitted out, often with furniture, and ready for immediate occupation. The advantages of conversion and speed of occupation should be contrasted with the greater expense of this type of occupation.

It is also likely that temporary premises could be available from within the Civil Estate, both property vacated by the Government and properties where the space is not sufficiently utilised. PACE has a database of information concerning Civil Estate property collected under the terms of the Civil Estate Co-ordination Agreement (CECA) and should be contacted for details of any suitable premises.

**What should you do?**

1. Contact PACE to ascertain the availability of temporary premises within the Civil Estate.

2. Instruct property advisers to carry out a search for a short-term hiring or serviced premises.
Having established a requirement within the Department and notified PACE, any consideration of options available, setting of budgets and obtaining Treasury approval should be supported by financial appraisal carried out in accordance with Treasury guidance in “The Green Book”. The appraisal will compare and contrast the fixed and variable costs arising from the various alternatives. The costs to be appraised should be whole life costs and include:

- rent, CILOR/rates, service charges, insurance and annual repairing costs;
- direct operating costs ie energy and water consumption;
- transaction costs eg premiums, fees etc;
- immediate repair and decoration;
- fitting out and reinstatement expenditure;
- periodic maintenance and lifecycle costs;
- indirect costs ie staff travel;
- non-property operational costs; and
- ‘exchequer’ costs.

These costs should be appraised over the length of the lease or an appropriate ‘whole-life’ period having reference to Treasury guidance in “The Green Book”. The appraisal should also indicate the net present value of the options based upon a discount rate indicated within Treasury guidelines.

In the case of PFI proposals when there is a prospect of obtaining funds for a Crown Build approach, then this will provide a relevant Public Sector Comparator for PFI. The level of market rents can also be used as a helpful benchmark. However, adjustments will usually be needed to allow for different office quality and different lease terms and for cyclical factors in order to develop a like with like comparison.

It will be necessary to obtain advice from property advisers upon fixed and variable costs when evaluating the options.

**What should you do?**

(see over)
What should you do?

1. Obtain advice from property advisers on the fixed and variable costs arising within the alternatives being considered.

2. Review all options by comparing and contrasting on a like with like basis, over the length of the lease or an appropriate period.

3. Calculate the net present value of each option in real terms using discount rates provided within Treasury guidelines.

ACQ 2.5.1 Acquisition Report

Once properties have been identified as suitable for purchase or leasing it will be necessary to commission surveys and valuation reports. The surveys should report on the condition of the building and a pre-acquisition audit should be carried out to establish environmental liabilities such as contamination. A BREEAM assessment should also be commissioned. The Acquisition Report should establish the correct price-level at which to acquire the property in the case of a feuhold, or a report on the lease and an opinion value in the case of a leasehold acquisition.

Each report will provide a valuation of the property and reference should be made to the option appraisal guided by Treasury's “The Green Book”, structural survey, environmental audit and BREEAM assessment.

In the case of a feuhold interest being purchased there will be a capital valuation, and where a short lease is being taken (usually less than 25 years) an opinion of rental value will be provided having regard to the terms of the lease.

The acquisition report and surveys should provide information on the following:

- property dimensions (NIA);
- suitability for operational requirements;
- repair – what are the major liabilities? What are the life expectancies of elements of the structure and services?
- predictable abnormal expenditure – are there any features of the property which will lead to higher than normal expenditure and lifecycle cost ie air conditioning?
- BREEAM Assessment;
- any dangerous or hazardous substances used in the construction, and possible contamination;
- ecology and bio-diversity issues;
- availability of public transport – implications to indirect costs of staff travel;
- tenancies – is vacant possession being offered?
- tenure (report on title) if applicable;
• **town planning** – does the property have planning consent for its intended purpose, is it a listed building?

• **rating** – what are the rates/estimated CIOR liability?

• **services** – are services, including energy, sewage, water, provided by the landlord, what are the estimated outgoings?

• factors affecting value of property in medium to long term eg local authority proposals such as road works, compulsory purchase, large scale development in the vicinity, or potential contamination of the subject or adjoining sites, risk of flooding, storm damage;

• how the value of the property will move in the short to medium-term, ie is the surrounding area improving, or declining;

• a list of comparable properties to substantiate the valuation; and

• a clear and unambiguous recommendation.

In the case of PFI solutions it may be that the comparison between market rents with suitable adjustments to reflect different office quality or different lease terms may provide a useful benchmark to develop a like with like comparison of costs. Although the adjusted level of market rent may be above the local market rent level (which might be attributable to a depressed local market), Departments may be unable to take advantage of those lower market rents because none of the vacant space meets their particular needs.

**What should you do?**

Instruct property advisers with relevant experience in the type of property and geographical area setting out the requirements to be included within the report.
HEADS OF TERMS

Negotiations between the vendor and the Department’s property advisers should aim to agree as many terms of the acquisition as possible. The agreed matters are known as ‘Heads of Terms’. In order to be able to compare options, and to keep options open, the property and legal advisers should draw up and open negotiations on ‘Heads of Terms’ for each serious option. The desired ‘Heads of Terms’ for each property should be submitted to the owner at the start of negotiations. The aim is to define each term in as much detail as possible to avoid later changes. The negotiation process will allow the relative merits of each option to be assessed and a conclusion reached as to the preferred option.

Any correspondence on the Heads of Terms with the seller/landlord should comply with The Requirements of Writings (Scotland) Act 1995. Such correspondence must contain the paragraph, ‘This letter is not intended to form part of a legally binding contract and the correspondence of which it is part is expressly subject to the completion of formal legal missives in accordance with Scots Law’.

Matters for inclusion in the Heads of Terms generally include:

- the parties;
- price or rent – feuhold price or annual rental of the premises;
- lease term – length of lease – including any break clauses;
- other lease terms – but specifically: rent reviews, repairs, alienation, user;
- subject to demise/boundaries – plans can be agreed if necessary;
- fixtures and fittings – what is to be included in subjects/sale and what is to be paid for both now and at rent review;
- programme to complete.

Departments might find it helpful to refer to the summary, included below, of Key Issues that should be considered by Departments intending to lease property for Government occupation. The main ‘Heads of Terms’ are listed, and guidance is given under each heading. The summary can be used to check that all the main points have been covered in the negotiations. This summary also includes lease clauses that would be applicable to the pre-letting agreement in a Private Developer Scheme (PDS). Departments should also refer to the Estate Management chapter for further detail.
The RICS and the Law Society of Scotland publish model lease clauses which Departments may also find useful.

The price or rent should be the last element to be agreed. The appropriate price or rent cannot be determined until the value implications of all the other agreed terms have been assessed.

What should you do?

1. With property and legal advisers draft the desired Heads of Terms and discuss rent and price levels.

2. Liaise with the Department's property and legal advisers upon the progress of the Heads of Terms negotiations and decide upon a preferred option.
GUIDANCE ON THE KEY ISSUES TO BE CONSIDERED WHEN LEASING PROPERTY TO BE HELD BY GOVERNMENT

These key issues need to be considered and applied in the context of the prevailing market conditions and the relative bargaining positions of landlord and tenant.

This guidance is not intended as a substitute for the professional advice of property and legal advisers.

1. Size of Leased Area

The agreed area must be in accordance with the RICS/ISVA Code of Measuring Practice in its current version. If the floor areas are to be agreed in the lease they must refer to this Code or to a plan showing the extent of the area that is deemed to have a particular floor area. The plan must be attached to the lease as it defines the area to be measured for assessment of rent. This may be different from the demised area. The demised area should also be clearly marked. Any rights of way, wayleaves, servitudes etc must be clearly defined and identified on the lease plan. In any Agreement for Lease where the premises are to be constructed, there needs to be provision for review of the rent by reference to the net internal area of the premises at practical completion with provision for determination by arbiter or expert (depending on current market practice) in the event of dispute. (Please see also point number 37 below).

2. Length of Term

It is important that the Department considers its operational requirements set out in the Estate Strategy, and the effective life of the building when considering the length of the term to be agreed in any new lease. Typically a 5 or 10 year term will provide the necessary flexibility to meet the Department's future requirements. Formerly 25 year leases were standard, but this is likely to exceed the Department's requirements and may exceed the life of the building. Departments should consider carefully before agreeing a lease exceeding 15 years. Where more than a 10 year term is to be agreed the increase in the value of the investment to the landlord should be reflected in the deal. Avoid reference defining the term as ‘including any extension’, to include this could create an increased liability in the event of an assignation.
Terms should include breaks at regular intervals so that no lease is taken for more than 15 years without a right of termination. The break should fall one year after the rent review date, or in the third or fifth year of the term and if possible at the tenth year as well, having regard to the rent review pattern. Where there are break clauses the tenant needs to avoid conditions attaching to the break (eg complying with the terms of the Lease) so that the break is dependent only on giving notice and paying the rent to the date of the break.

3. Break clauses

Break clauses will give Departments a high degree of flexibility in their management of the property. Departments should push for the inclusion of break clauses in accordance with the Property Plan, particularly where leases longer than 10 years are taken. Break clauses should only be operable by the tenant (not ‘mutual’) and should not have any pre-conditions, known as ‘conditions precedent’, which would preclude successfully operating the break, such as full compliance with all repairing covenants. Conditions precedent are strict and non-compliance can make a break clause void. It is possible that the inclusion of break clauses will impact on the rent and landlords may require a higher rent to compensate for this flexibility.

4. Security of Tenure

Unlike in England, commercial leases in Scotland do not benefit from statutory security of tenure beyond the lease term. Minimum periods of notice are prescribed by statute and assuming these are complied with the lease terminates on the contractually agreed date.

If such notice is not given, under the doctrine of tacit relocation, leases of over one year may continue from year to year on the same terms and conditions, including rent, until terminated by either party serving the requisite notice. Leases of less than a year will continue for the equivalent duration until requisite notice is served.

Shop tenants do benefit from a limited form of security of tenure. Statute provides that the Sheriff Court may specify the conditions under which a tenant may renew the lease for a period not exceeding one year. Statute lays down grounds upon which the court may refuse renewal.

Licences do not benefit from security of tenure.
5. Rent

The amount of rent should not be agreed until after all the other terms and conditions have been discussed and agreed.

Rent is usually payable quarterly in advance either on the usual quarter days or as agreed by the parties. If it is possible to agree rent payment in arrear, this would be the preferred option; however, this is not usually possible. Interest should be avoided on overdue rent, however, if interest has to be conceded on overdue rent then it should not start running until 14 or 21 days after the due date and should be limited to a maximum of 2% above bank base rate. No interest should be payable on rent increase at rent review where the rent increase is outstanding because of lack of agreement at the review date. Departments should not agree to the payment of rent by bankers order. You should also consider deleting the exclusion of rights of set-off so that if necessary set-off can be claimed against rent. The definition of rent also needs to be reviewed and if possible exclude the definition covering insurance, service charge and VAT because of the remedies that will be available to the landlord if such matters are reserved as rent.

6. Rent review

Rent review clauses should be in accordance with the RICS/Law Society of Scotland Model Clauses. Reviews are likely to be at 3, 4 or 5 yearly intervals. Less than 3 yearly would not normally be acceptable. A rent review on the last day of the lease term should be avoided.

If possible the reviews should be upward and downward but this is often difficult to negotiate and may result in higher rents. Rents are usually reviewed to the prevailing open market value, but ‘headline’ rents should be avoided when conducting review negotiations. Rents are not normally index linked, this would not usually be desirable, however, there are circumstances where index linking would be beneficial. Advice should be sought. Disregards in respect of rent free periods of comparables, widening of user clauses or disregard of other premises, VAT etc are not acceptable. If there is any risk that passing rent could move out of line with open market value during the lease, advice must be taken from a senior level. In some cases Treasury may need to be consulted. The need to disregard at rent review, work carried out by the Tenant prior to lease commencement (ie under licence) must not be overlooked. The revised rent should not include the value of any alterations or improvements carried out by the tenant, or any under tenant or assignee prior to or during the lease term. Advice should be sought.
Endeavour to make **time of the essence** for notices to initiate the review. If this is not possible, attempt to limit the landlord’s ability to backdate his claim for the increased **rent** to 6 months from the date of notice. If the landlord insists on interest being paid pending determination of revised **rent**, the effect can be reduced by a provision that no interest is payable where the revised **rent** is more than a certain amount below the amount that is proposed by the landlord, and/or, further providing for the tenant to pay what it considers appropriate **rent** pending the determination of reviewed **rent**. This should reduce any interest payable when the revised **rent** is determined.

In the event of dispute reference should be to an **arbiter** not expert. Good reasons would have to be produced to justify a departure from this advice.

Case law concerning **rent review** changes frequently as the interpretation of **rent review** clauses is constantly being challenged in the Courts. It is important that the Department’s property and legal advisers, who should be familiar with current case law on this subject, closely consider the precise terms of the **rent review** clause.

### 7. Repairs

Acceptance of **repairing obligations** should always depend on the building’s condition. Particular care must be taken to evaluate the life of major elements such as cladding, plant or roofs to ensure that **repairing obligations** are not onerous in relation to the age of the building and length of **lease** taken. It may be appropriate to seek indemnities for specific parts of a building. In the case of new buildings, professional and contractors warranties or decennial insurance for both structure and **services** should be obtained, both if possible, in addition to the benefit of the normal 12/24 month defects liability provisions in the Developers Contracts. **Every effort should be made to ensure that the landlord takes responsibility for latent defects.** If the landlord will not take responsibility for latent defects (and latent defects insurance is not appropriate given that the Crown normally carries its own risk) then provision should be added so the tenant is not obligated to remedy design defects or latent or inherent faults to the extent that the cost of the remedial work is recoverable by the landlord from its developer, architect, engineer or building contractor (and the landlord is to use its best endeavours to enforce such rights and remedies as it has against such persons). In addition, as indicated, appropriate warranties should be taken from the relevant professionals and contractors and decennial insurance where relevant.
8. Service Charge

Where the whole building is to be leased, the property is likely to be held on full repairing terms (FRI). In this circumstance there will be no payments to the lessor except where common facilities/service are enjoyed, i.e. landscaped areas; common roads; etc. These costs to be covered by a service charge.

Where part only of the building is to be leased, the property will normally be held on internal repairing terms (IR) with the lessor responsible for external repairs and common areas, recovering the costs by means of a service charge. The landlord must covenant to keep in repair at all times. A preferred position is where the landlord has a best or reasonable endeavours obligation to provide an agreed list of services which involve keeping in repair the following:

- the main structure of the building including its exterior, foundations and roof;
- all service and conducting media;
- all common parts and boundary walls and any other part of the building not included in the lease or in a lease of any other part of the building.

In addition, there should be provision for the landlord to enforce against any lessee or occupier of other parts of the building, covenants contained or implied in any lease or licence which is enforceable by the landlord so as to reserve the tenant’s rights in respect of other occupiers. It is likely however, that the landlord will require that any such proceedings are carried out at the tenant’s cost.

There are two further matters on which the tenant would want to ensure, if possible, that there is provision in the lease:

- the tenant is able to carry out works in the event of the landlord’s failure to do so; and
- service charge is to be reduced if the services are not provided to an agreed standard.

Where the landlord has responsibility for repairs or provision of services, these must be clearly defined in the lease. There must be no reference to any rebuilding clause or creation of sinking fund. Any proposed major repairs must be referred at least 6 months in advance to the tenant and the landlord must arrange for details of specification and competitive tenders to be made available to the tenant before acceptance.
Payment of service charge should not be treated as rent. If possible, a full repairing obligation should be avoided and the repair of the premises should be by reference to an attached Schedule of Condition with an obligation to give back the premises in no better state of repair than set out in that Schedule of Condition.

The amount of the service charge should be an agreed contribution preferably as a percentage of the area occupied in relation to the whole, both areas to be agreed and stated in the lease or in exceptional cases as a percentage of the user. This requires a clear statement. However, separate metering of utilities should be considered since Departments will be responsible for implementing Government energy saving policies. The resulting reductions in energy use should be clearly demonstrable, and the financial benefits remain with the Department. When negotiating a lease it may be useful to introduce a ‘cap’ to limit future service charge increases. Advice should be sought.

All service charges are to be audited by a qualified accountant preferably independent of the landlord, clearly defining the costs of each service and issuing a certificate of expenses and outgoings and showing the apportionment. The tenant must have the right to see and to take copies of vouchers or receipts.

Any management fee must be based on the cost of services provided, not on the collection of rent.

In the event of dispute on any sum in the service charge, this may be submitted by either party to either an independent expert or arbiter, who must be agreed between the parties or by appointment of the RICS/Law Society of Scotland/Chartered Accountants of Scotland. No payment of interest shall be required on the amount of service charges in dispute.

9. Insurance

In sole occupancy buildings the Secretary of State will normally carry its own risk while it is the lessee. The lease would usually include a clause that there is no need for the tenant to insure the property as long as it is vested in the Crown. In part occupied buildings the lessor insures and the tenant repays the appropriate proportion of the premium. The tenant should benefit from any long-term discounts and any commission and should, therefore, only pay the net premium.
In the event of damage to or destruction of the demise or adjoining property where this renders the demise unoccupiable in whole or part and where the landlord is responsible for reinstatement, this must be clearly stated in the lease (and should not be limited to damage by an insured risk). There should also be a cessation of the covenant to pay rent for the whole or appropriate part until the premises are repaired or rebuilt so as to be fit for immediate occupation or use. Disputes should be resolved by arbitration. The tenant must have the right to determine the lease if the premises are destroyed or rendered unusable for the tenant’s business and have not been reinstated within the period for which the landlord has insured for loss of rent and a right to determine in any event.

A tenant’s rebuilding clause should be avoided. Instead, provision should be made in the lease so that the landlord is required to reinstate in the event of destruction or damage by any of the insured risks, to obtain any necessary planning permissions and (if possible) to make good any insufficiency of the net insurance proceeds from the landlord’s own money. In the insurance obligations the landlord should also be required to regularly provide the tenant with details of the policies of insurance, notify the tenant of any changes in the insured risks and arrange for the tenant’s interest to be endorsed on the policy. These terms as to insurance only apply where the Secretary of State is taking part of the premises and is therefore obliged to contribute towards the costs of the insurance. In sole occupancy buildings the Secretary of State carries its own risk.

10. Rates and Crown Property

The current system

Until 31 March 2000 Crown occupiers will continue to pay a ‘Contribution in Lieu of Rates’ (CILOR) which is based on a rateable value set by the Valuation Office Agency (VOA). This rateable value (RV) is assessed in the same way as for properties that are not Crown occupied. The amount payable is calculated using the Uniform Business Rate (UBR) multiplier and reflecting any transitional arrangements, just as for any other occupier. However, unlike other occupiers, the Crown is billed by the Crown Property Unit of the VOA, not the local authority and although Crown occupiers can seek a review of their rateable value there have been no formal rights of appeal. The lease should contain a clause to indemnify the landlord against payment of business rates for the period that the property is vested in the Crown or until Crown exemption is removed. This exemption is to be removed from 1 April 2000 (see below). Thereafter leases will usually include a clause in which the tenant covenants to pay the rates due to its occupation.
The new system

The Local Government and Rating Act 1997 provided for the removal of Crown exemption from non-domestic rates from a date to be appointed by order of the relevant Secretary of State. On 15 June 1998, Ministers announced to Parliament that this power would be invoked to operate from 1 April 2000 to coincide with the next revaluation and will apply to England, Scotland and Wales.

The new system means that Crown occupiers will become liable for rates on their property, just like any other business occupier. The implications for Crown occupiers are described in more detail below.

11. Alienation

It is important that the alienation provisions should be as flexible as possible. Departments should be permitted to assign or sub-let the premises subject to the lessor's consent; such consent should not be unreasonably withheld or delayed.

Departments should be permitted to assign or sub-let the whole or part if possible, of individual floors, subject to the lessor's consent; this consent should not be unreasonably withheld or delayed.

Departments should be permitted without the landlord's consent to assign, sub-let or share possession with any Department, Agency or body carrying out functions on behalf of the Crown, or to contract out any part of its services.

Where it is impossible to avoid restrictions on assignation, relaxation of the restrictions on sub-letting should be negotiated.

12. Alterations

It is important to ensure that the provisions regarding alterations are not unreasonably onerous. Normally the landlord's consent should only be required for structural alterations and consent should not be unreasonably withheld or delayed. Provision should be made for the landlord to respond to a request for consent within 4 weeks, after which the landlord will be deemed to have given consent. Occasionally repairs that are the responsibility of the tenant may involve structural works that could be classed as alterations. The landlord should permit these works.
It is important that alteration works are not carried out as an obligation to the landlord, because they may then be taken into account in assessing the rent on review. Normally a clear statement should be made in any consent, that the alterations should be disregarded for the purpose of rent review and renewal of the lease.

Every effort should be made to avoid the acceptance of liability to reinstate the alterations at the end of the lease.

It is essential that copies of plans, specifications and correspondence relating to each application (sometimes this may be in the form of a licence for alterations drawn by lawyers) are held securely with the lease documents in the Department's Deeds store.

13. Signs

Departments should have the right to erect signs both internally and externally, confirming the identity of the occupants. Similar rights to install letter boxes may also need to be inserted. If landlord’s consent is required, it should not be unreasonably withheld or delayed.

14. User

It is important that the user clause in the lease meets the operational requirements of the Department’s proposed use. In office premises the normal wording is ‘Government or other office use’ and is usually extended to include luncheon clubs and other ancillary uses. This use should extend to any Government Department or Agency or body carrying out functions on behalf of the Crown. It is important to avoid restrictive user clauses which may cause difficulty in trying to dispose of the property at a later date.

Where only part of the property is being leased or the landlord retains letting rights over shop units within the property or immediate vicinity, Departments should reserve the right to be consulted before lettings take place and refuse consent on security or other grounds which would have to be specified in the lease.
15. Planning and Other Statutes

Only some statutes are binding on and apply to the Crown. A covenant to comply with statute should contain words to the effect that the Crown need only comply with those statutes that are binding. It is particularly important, in view of the Scottish Executive’s planning role, that the clause should not oblige the First Minister to join with the landlord in supporting or opposing any action relating to statute. It may also be appropriate for the Crown to indemnify the landlord against any action in respect of those statutes that are not binding on the Crown.

16. Confidentiality

A Confidentiality Clause is not normally acceptable, as it does not accord with the “Code of Practice on Commercial Property Leases” endorsed by Ministers. However, no publicity should be allowed without your prior written agreement and approval to the wording of any press release.

17. Access

Where part only of a building is taken, it is important that access and services should be available at any time, particularly outside normal office hours, in order to meet the Department’s requirements.

18. Costs

Each party should normally be responsible for its own costs in respect of the lease.

19. Car Parking

Any car parking should be included in the main lease and spaces clearly marked on the plan. Arrangements for security and access should be in accordance with the Department’s requirements.

20. Manuals/Drawings

The lessor must provide all as-built drawings, negatives and computer aided design discs and appropriate manuals on handover or within specified time thereafter. There must be a right to reproduce these without fee and any copyright must pass to the Crown.
21. Landlord’s Failure to Repair

The tenant should have the right to enter and carry out works in the event of landlord’s failure to do so, with the power to make a corresponding adjustment in the rent or service charge.

22. Collateral Warranties

Collateral Warranties in normal form will be required from all contractors and major sub-contractors that have taken part in the development, they will warrant that deleterious materials have not been used and that all the best building practices have been used and that in all respects the contractor/sub-contractor has complied with his contract, used only the best and specified materials all in a proper and workmanlike manner. Similarly, all members of the professional team will be required to give collateral warranties which may be assigned (without prior consent) and will in addition have to demonstrate that they are suitably insured to a certain level of cover for each and every claim. Any warranties must be backed by Professional Indemnity (PI) insurance for 12 years, project insurance is preferred. As a ‘wrap around’ the landlord should give a warranty by way of lease covenant that there are no latent or inherent defects in the building or that he will accept liability for rectifying any that develop during the period of the lease. For acquisition by assignment, collateral warranties or decennial insurance cover for the benefit of the existing tenant should be assigned with the lease.

23. Latent Defects

These should be remedied by the lessor at no cost to the lessee.

24. Structural Survey

No building should normally be taken onto the Department’s estate without first obtaining a full structural survey.

25. BREEAM

A BREEAM report on acquisitions of new or refurbished property should be sought.

26. Site Survey

A site survey, in particular with respect to the possibility of contamination, should be required.
General

27. The insertion of an option for the Department to purchase the feuhold should be considered.

28. The landlord should covenant not to develop over, under or near the demise without first agreeing a working regime with the Department.

29. You should avoid a requirement to join with other tenants within the building or development as a shareholder in a management company. However, if this is unavoidable, the following terms should, where appropriate, be incorporated:

   a. The First Minister will be allowed representation on the company managing the overall site with voting rights commensurate with the proportion that the space occupied bears to the overall net lettable area provided. This proportion may need to be varied to take into account parts of the site which are not currently being developed but which may be in the future.

   b. The First Minister will have the absolute right throughout the period of lease to veto items of expenditure over a prescribed limit which do not constitute part of a reasonable maintenance and repair programme.

   c. The First Minister will require the landlord to take whatever measures may be necessary from time to time throughout the period of the lease to optimise any environmental issues.

   d. The First Minister must be allowed full access to all accounts, invoices and reports relating to the service charges at any time at no charge and have the right to take copies.

   e. The service charges must be certified by an independent accountant.

   f. The landlord will commit himself to attending call-outs for emergencies within specified time-frames.

   g. The First Minister will be empowered to monitor any Building Management System in operation. Any defect in that system will be remedied at the landlord’s expense.

   h. The First Minister will be entitled to withhold any service charge payments if not satisfied with the maintenance of the building and the levels of service.
The following clauses should be considered for any Private Developer Scheme or Pre-let.

30. To stipulate completion date for works and Ingoing Services if they are included in the work to be carried out by the main contractor. There also needs to be a provision for the landlord to be responsible for defects liability in similar terms to the obligation of a builder under the building contract for the development of the property.

31. If works not completed by due date, lessors should be made liable, under a penalty clause, to pay an agreed sum or, alternatively, the rent commencement date must be deferred for the appropriate period.

32. The First Minister to be permitted to monitor the construction and to draw the developer's attention to defects, which the contractor must remedy.

33. The First Minister to be consulted on the issue of the 'Certificate of Practical Completion', and the developer must be required to provide us with all the certificates, manuals etc at that time. Practical completion is to be agreed and in default of agreement to be resolved by arbitration, before the practical completion certificate is issued.

34. A final ‘fall back’ date for completion of building, after which Agreement for Lease becomes null and void preferably at the option of the First Minister. There also needs to be provision for step in rights so that the First Minister can step in and take over the development of the building in the event of failure by the landlord to do so within an agreed time-scale or in the event of insolvency of the landlord or the building contractor.

35. The First Minister's repairing liability should exclude inherent defects, but include fair wear and tear in respect of fitted carpets. Landlord should covenant to remedy inherent defects after notice. Default after 6 months in the case of non-structural defects may be remedied by the tenant, subject to recovery of the cost.

36. Ingoing services provided by the developer at the tenant's expense should be provided by competitive tender and must be subject to cost approval by the tenant's quantity surveyor.
37. If, for any reason, possession is required before completion of all landlord's works, including snagging works, there must be a requirement for these works to be carried out by the landlord expeditiously and with the minimum disturbance to the Department, and that adequate security be provided to cover the cost of any works not completed by the term commencement date.

38. Area of Building. It must be quite clear what the net internal area of the building will be on completion, and there should be a penalty clause imposed on the developer if he provides a building which is either too small or too large. It is suggested that a given area (m²) is agreed with a plus or minus leeway. Over and above that the penalty clause should be implemented on a sliding scale. A further figure should be agreed, either too small or even too large and the Department should have the right to rescind the contract.
ACQ 3.0 LEGAL

ACQ 3.1 LANDHOLDING POWERS

Property within the Civil Estate is generally acquired in the name of the Secretary of State for Environment, Transport and the Regions. Occasionally, older documents refer to the Commissioners of Works, the Minister of Works or the Minister of Public Buildings and Works, who are all predecessors of the Secretary of State for the Environment, Transport and the Regions. The derivation of title is set out later in this Guide.

It is the intention that Departments will continue to hold and acquire Civil Estate Property in the name of the Secretary of State for Environment, Transport and the Regions. This will continue to exclude accommodation on the Government’s other main estates i.e. Defence Estate, Overseas and Diplomatic Estate, Prisons Estate and some small specialist estates which will be held in the names of specified Ministers or that of the Crown Non-Departmental Public Body.

The Secretary of State for the Environment, Transport and the Regions’ main powers to acquire and hold land derives from the Commissioners of Works Acts of 1852 and 1894. Statutory Instrument 1997, Number 2971, made under the Ministers of the Crown Act 1975, and which came into operation on 26 January 1998, vests these powers in the Secretary of State for the Environment, Transport and the Regions. This Statutory Instrument provides that anything done by or in relation to any other Secretary of State for the Environment, Transport and the Regions shall have effect that this is done by or in relation to the Secretary of State for the Environment, Transport and the Regions. It also allows for the Seal for the Secretary of State for the Environment, Transport and the Regions to be authenticated by the signature of any other Secretary of State or a person authorised by them. A DETR Guidance minute on the issuing of documents by or on behalf of the Secretary of State for the Environment, Transport and the Regions, together with a new form of authorisation can be found in PACE Central Advice Unit’s Information Note 12/98. DAO (GEN) 1/96 (Annex 2 to Appendix 2) covers the responsibilities of Departments in relation to Deeds and Sealing.

Where documents require sealing, arrangements have been made for Departments to either have a copy of the Secretary of State for the Environment, Transport and the Regions’ Seal or documents can be sent by Departments to the PACE deeds registry for sealing. This service is provided on a repayment basis.
Where documents do not require sealing ie execution under hand, they should be prepared and executed in the name of the Secretary of State for the Environment, Transport and the Regions by authorised officials of the relevant Department.

Legal advice must be taken on what execution formalities are required for all classes of documents. The terms of the Requirements of Writing (Scotland) Act 1995 must also be met in respect of execution of deeds.
ACQ 3.2

**DRAFTING AGREEMENT**

In Scotland the contract for the purchase/sale/lease of land is put in place by Missives between the Parties' legal advisers as agents for the Parties.

Missives are an exchange of correspondence between the Parties' solicitors comprising an offer, thereafter one or more qualified acceptances (qualifying the terms of the offer), and finally an unconditional acceptance to conclude the bargain.

If the transaction is a Lease or Sub-Lease, the Missives will incorporate the terms of an agreed draft Lease (or Sub-Lease) adjusted between the Parties' solicitors.

If a transaction is a purchase, the offer will be prepared by the legal adviser acting for the purchaser who also drafts the Disposition which will transfer the title of the subjects. If the transaction is a Lease of a Sub-Lease, the Lease/Sub Lease will be drafted by the Landlord/Mid-Landlord's legal advisers. The draft Lease (the 'travelling' draft) will then be revised by the solicitor acting for the tenant and will usually undergo a couple of rounds of revisals between the Parties' legal advisers before it is in agreed form. Accordingly, the offer is often also amended between the Parties' legal advisers as a draft so that when both the terms of the offer and the travelling draft Lease are agreed, the offer (incorporating the agreed draft Lease) can be issued for an unconditional acceptance to put the contract in place.

As soon as the Missives are concluded, a binding contract exists between the Parties and this difference in practice to England should be noted.

**What should you do?**

1. Instruct legal advisers following agreement of the Heads of Terms.

2. Ensure a copy of the 'travelling' draft documentation is provided at various stages through the amendment process to the Department's property advisers for comment.

3. Ensure that the advisers prepare a report if required at the conclusion of negotiation, which will cover a summary of the terms and their implications.

**NB.** Ensure the report if required is obtained before the Missives are concluded.
ACQ 3.3

TITLE

Following instruction of solicitors in an acquisition they will, as part of their brief, carry out a search to check that the property to be acquired has a valid title which can be transferred to the Department. **This should have been done early as part of the option appraisal process.** This is an essential process, particularly in the case of feuhold purchases, where certain rights and restrictions may be granted to third parties which would pass with the purchase under the principles of ‘caveat emptor’ ie buyer beware. A further check on title is also generally carried out as close as possible to completion.

Once the transaction has been completed the Department Solicitor will submit the deed to the Keeper of Registers of Scotland, to transfer the ownership.

**What should you do?**

1. Liaise with the legal advisers on the terms of the title and the searches being carried out.

2. Obtain a note of title conditions and copies of searches for record purposes.

3. Enter the information in respect of the transaction in the estate record system.

4. Conform with Departmental policy in respect of storage of original contract documents.
Once the Missives have been concluded, prior to the date of entry specified in the Missives, the title will be noted, property and other searches obtained all ready for settlement. On the date of entry the purchase price (or the rent if the transaction is a Lease and there is no rent-free period) becomes payable.

In return for a purchase/sale, the Disposition transferring title is delivered to the purchaser's legal advisers. If the transaction is a Lease, the Lease is often only executed after settlement by both Parties.

Thereafter the legal adviser acting for the purchaser/tenant should arrange for the Disposition/Lease to be recorded in the General Register of Sasines or registered in the Land Register for Scotland, if necessary. It should be noted that the title deeds are likely to be at the record for quite some time and, accordingly, the principal deed will only be available for safekeeping in the title safe thereafter.

Stamp duty would normally be payable, however the Crown is not liable for stamp duty.

What should you do?

1. Ensure that property and legal advisers maintain momentum throughout the legal process.
2. Ensure that the negotiating position is maintained, preferably in accordance with a predetermined negotiating strategy.
3. Obtain a copy of the completed document from legal advisers as soon as possible after conclusion of missives.
4. Enter the information in respect of the transaction in the estate record system.
5. Conform with departmental policy in respect of the storage of original legal documents. PACE CAU can provide a note on this entitled “Guidance on the Management and Care of Original Documents - Deeds and Sealing”.
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6.4.15 COMPULSORY PURCHASE
This chapter provides an overview of the estate issues which commonly need to be considered in the management of a Departmental portfolio. It deals with the form in which property is normally held ie feuhold, leasehold or licence. The requirements that are normally contained in leases and other matters which have an impact upon management such as statutory requirements, ownership restrictions, Health and Safety and environmental considerations. There is a section dealing with the management of sub-lets where the Department has let surplus space to commercial tenants, and, also a section relating to joint Crown occupation. Subsequent sections deal with matters that are the subject of statutory requirements such as Rates and Town and Country Planning.

A grounding in the factual information contained in this section will assist in the process of maintaining the principle of good estate management.

It can be used as a reference document for dealing with such matters as understanding the purpose of notices received from landlord and/or tenants but should be read in conjunction with the Strategic section particularly with regard to maintaining property records and forward planning. The receipt and review of notices, for example, should be part of a planned process (supplemented by diary prompts) and integral to the Department's estate strategy.

**Failure to serve correctly or reply to notices and/or counter-notices can result in severe penalties to Departments in respect of increased costs and missed opportunities.**
There are only two interests (also known as ‘estates’) which may exist in land; a feuhold (technically a ‘fee simple absolute in possession’) and a leasehold (technically a ‘term of years absolute’). The legal extent of these ‘estates’ is commonly known as the ‘title’.

It is common knowledge that a leasehold interest of, say 99 years amounts to something less than a feuhold interest, but what is the difference? Both leaseholds and feuholds are known as ‘estates in land’, but for historical reasons whereas ‘estates’ of indefinite duration were known as feuholds, ‘estates’ of a limited and definite duration were known as leaseholds.

A lease therefore is ‘an estate in land of a fixed and definite duration’. Although this is a complex area of the law, essentially what distinguishes a lease from other forms of occupation (such as licences) is the fact that a tenant with the benefit of a lease has exclusive possession. It follows, for example, that if a landlord has leased a property but needs to have entry to inspect repairs, he needs to reserve rights to do so in the lease.

Both feuhold and leasehold estates may be subject to a variety of private and public rights and restrictions. For example, an owner of land may grant a right of way over that land to a third party and he in turn may have rights to abstract water from a river, but he will still require planning permission for most changes of use and development.

The way in which a purchaser of land and those with the benefit of rights in relation to that land are protected on the transfer of an ‘estate in land’ is a complex area of the law.

**What should you do?**

Seek advice of legal and property advisers where necessary.
MGT 1.1.1 Establishment and Registration of Title

All land in Scotland is either recorded in the Register of Sasines (a register of deeds affecting land, which was set up in 1617) or registered in the much more recent Land Register, which is county by county, and is gradually replacing the Register of Sasines.

Where a title is ‘registered’ in the Land Register (virtually) all the relevant details of ownership relating to that property are recorded definitively on a central register which is maintained by the Registers of Scotland. This register is kept permanently up dated and where a property purchase is envisaged, the theory is that a prospective purchaser need only consult the Land Register in order to discover all the relevant legal information about the land.

Where title is recorded in the Register of Sasines the purchaser must ‘investigate’ title by studying the recorded deeds relating to the property in the hope of finding all the relevant legal information. In order to establish ‘good title’ the purchaser must be able to establish that a chain of ownership exists stretching back over a period of at least 10 years and leading to the vendor. This is commonly called ‘a prescriptive progress of title’.

What should you do?

Have your legal advisers check your title well in advance of any proposed sale to ensure that all the relevant deeds are available.
MGT 1.1.2

**Devolution of Title**

Departments will from time to time be required to demonstrate how title has devolved to them. The sequence is as set out below.

1. The principal powers to acquire land and property and hold it for the public service derive from the Commissioners of Work Acts 1852 and 1894.

2. An Order in Council made under the Ministry of Works and Planning Act 1942 transferred the powers of the Commissioners to the Minister of Works with effect from 15 August 1945.

3. By Statutory Instrument 1962 No. 1549, made under Section 2 of the Ministers of the Crown (Transfer of Functions) Act, 1946, and which came into operation on 24 July 1962, the style and title of the Minister of Works was changed to the Minister of Public Building and Works. This Statutory Instrument is entitled “Ministers of the Crown-the Minister of Works (Change of Style and Title) Order 1962”.

4. By Statutory Instrument 1970 No. 1681, made under the Ministers of the Crown (Transfer of Functions) Act, 1946, and which came into operation on 12 November 1970, the functions etc of the Minister of Public Building and Works were transferred to the Secretary of State for the Environment. This Statutory Instrument is entitled “Ministers of the Crown-the Secretary of State for the Environment Order 1970”.

5. By Statutory Instrument 1997 No. 2971, made under Sections 1 and 2 of the Ministers of the Crown Act 1975, and which came into operation on 26 January 1998, the functions etc of the Secretary of State for the Environment were transferred to the Secretary of State for the Environment, Transport and the Regions. This Statutory Instrument is entitled “Ministers of the Crown-the Secretary of State for the Environment, Transport and the Regions Order 1997”.

**What should you do?**

Inform your legal advisers accordingly.
FEUHOLD PROPERTY

Feuhold property is owned outright and not occupied under any lease or other agreement. Although the Department will owe no lease obligations to a landlord, all or part of the property may be let to a tenant and therefore it will be necessary to manage any lettings.

Feuhold property occupied by the Department provides greater flexibility than leasehold in terms of use, alterations and disposal but it must be remembered that statutory restrictions such as planning still apply.

Repairs to owner occupied property are obviously the responsibility of the feuholder so a regular programme of inspections, decoration and maintenance needs to be set in place. Given the longer term nature of feuhold property, any improvements or repair works that are required can be planned and spread over a number of years if necessary to satisfy cash flow restraints.

Feuhold land may be subject to burdens. These may restrict the use of the land and run with the land binding subsequent owners.

Servitudes may also apply to the property whereby third parties may be granted permanent rights of light, support, access, etc.

The importance of establishing and observing all title conditions and rights affecting property, therefore, is paramount.
**MGT 1.3 LEASEHOLD PROPERTY**

**MGT 1.3.1 What is a Lease?**

A lease is a contract by which a tenant occupies property. The form varies greatly but it will always be for a definite period, at a rent, and grant exclusive possession. Exclusive possession means that a tenant controls the property and can exclude all other persons from it. Generally, when a right to use land does not confer exclusive possession the grant is a licence. When either taking or granting a lease or a licence the input from legal advisers is vital.

Broadly speaking commercial leases can be divided into two types: fully repairing and insuring (FRI) and internal repairing (IR). In FRI Leases the tenant generally undertakes to carry out all the repairs and maintenance to the property and to insure or reimburse the landlord for insurance premiums or in the case of Government tenants, cover liability. In the case of internal repairing leases the tenant is not responsible for expenditure on the exterior or structure.

All leases are unique in their drafting and variations, however the above two types are common. It is vital therefore that the whole lease is thoroughly read and understood.

A further type of lease is a ground lease. Frequently for a long-term, a ground lease is at a rent lower than the market rent or even at a nominal amount (a ‘peppercorn’). The ground rent often reflects the value of the land without the benefit of any development.
MGT 1.3.2 Lease Contents

Many of the obligations usually contained in leases have been covered in the Acquisitions chapter which should be consulted together with later sections of this chapter. A typical lease may take the following form:

**Date:** the date the lease document was legally completed.

**Definitions:** the meaning of certain words or phrases used within the lease. The lease should always be read using these definitions.

**The parties:** the name and registered address of the landlord and tenant and any guarantors.

**The demise, rights and reservations:** here the property or the part of it the tenant is to occupy is described in detail, usually having reference to a lease plan. Also covered should be any car parking arrangements, rights over roadways or adjoining property and possibly hours of access. Rights over the property reserved by the landlord will be stated here.

**Term:** the lease will specify the term of years and commencement date (“the date of entry”) and sometimes the expiry date of the lease.

**Rent:** rent may be subject to review as detailed later. This part of the lease will also state when and how the rent is payable.

**Tenant's obligations:** covered in detail below.

**Landlord's obligations:** covered in detail below.

**Breaks:** provisions for breaking the lease (option to determine the lease).

**Rent review:** provisions for reviewing the rent and the rent review dates.

**Service charge provisions:** details the services to be provided by the landlord and how and when the landlord can invoice the tenant for the expenditure incurred.

**Schedules:** any of the above may be contained in schedules at the rear of the lease.
Commercial Leases

Unlike in England, commercial leases in Scotland do not benefit from statutory security of tenure beyond the lease term. Minimum periods of notice are prescribed by statute and assuming these are complied with the lease terminates on the contractually agreed date.

If such notice is not given, under the doctrine of tacit relocation, leases of over one year may continue from year to year on the same terms and conditions, including rent, until terminated by either party serving the requisite notice. Leases of less than one year will continue for the equivalent duration until requisite notice is served.

Shop tenants do benefit from a limited form of security of tenure. Statute provides that the Sheriff Court may specify the conditions under which a tenant may renew the lease for a period not exceeding one year. Statute lays down grounds upon which the court may refuse renewal.

Licences do not benefit from security of tenure.

What should you do?

1. Ensure whether the Department is the landlord or the Tenant that notices to terminate Leases (and Sub-leases) are served in good time to avoid the lease continuing beyond its stated term by the operation of tacit relocation.

2. Take early advice from legal/property advisers as to what notices are required and when (and how) they should be served.
**LICENCE TO OCCUPY LAND**

A licence is a contract, falling short of a lease, whereby not the heritage itself but the right to use a particular part of it or to put a particular part of it to some use is granted. The main difference between a lease and a licence is that only a lease gives exclusive possession to the tenant i.e. the tenant controls the land and can exclude all other persons from it for the duration of the lease.

**Granting a Licence**

The concept of a licence is far less developed in Scotland than in England. Legal advice should be sought if you wish to grant a licence.

**What should you do?**

The advice of legal and property advisers should be sought.
Restrictions on land can be many and varied and very different in their enforceability. For these reasons it is essential to take advice from property advisers at the first opportunity when considering either disposal or acquisition. The main restrictions on land which are commonly found include:

- burdens or restrictions usually restricting use;
- rights of occupation by third parties licences, eg third party occupations;
- wayleaves, rights of way normally associated with statutory undertakings, eg electricity pylons; and
- servitudes, eg rights of light, rights of support, rights of access, rights in respect of drainage/water supply etc.

Restrictions on the use of land can materially affect value. There are, however, two ways in which such problems can be overcome.

First, it may be possible to negotiate a lifting of a restriction by paying a sum to the owner of the restriction. This is normally agreed through negotiation with a view to the increase in value which it will release to the landowner.

Second, it is also possible to apply to the Lands Tribunal for Scotland to discharge or modify restrictive title conditions and to award compensation as a ‘price’ for this. It derives its powers and regulations from Statute and its members are legally qualified or experienced in valuation.
Burdens of Title

Burdens are commonly found within title deeds. Typical burdens include restrictions on land such as preventing building on land conveyed or requiring the building and maintenance of a boundary wall. As burdens on land are usually not only enforceable against the original parties but also by and against successors in title, it is essential that on disposal or acquisition of land, the title is fully investigated by legal advisers to reveal any potentially restricting burdens.

Burdens may be either positive or negative either requiring someone to do something or refrain from doing something. The law relating to the enforceability of burdens against subsequent owners, and after long periods of time, varies depending on the nature of the burden (whether positive or negative) and is complex.

What should you do?

Seek legal advice on matters of this nature.
Licences

A licence is a contract, falling short of a lease, whereby not the heritage itself but the right to use a particular part of it or to put a particular part of it to some use is granted. The main difference between a lease and a licence is that only a lease gives deliberate exclusive possession to the tenant i.e. the tenant controls the property and can exclude all other persons from it for the duration of the lease.

Departments should generally not enter into licences.

Although the concept of licence is less developed in Scotland than England, it is essential to take legal advice if you wish to grant a Licence. Similarly, if you wish to bring a licence to an end consult your legal advisers as the notices must be correctly served.

What should you do?

The advice of legal and property advisers should be sought where necessary.
MGT 1.5.3  Servitudes

General

A servitude is a right in respect of another party's land, generally being either a positive servitude (a right to do something on or to your neighbour's land) or a negative servitude (a right to stop your neighbour doing something on their land).

Acquisition of Servitudes

There are a number of methods of creating servitudes:

• granted or reserved expressly; usually on the transfer of land;

• granted by implication (and in certain circumstances reserved by implication) when a landowner disposes of part of his land eg if the retained land is landlocked by the disposal a right of access might be implied; or

• acquired by prescription ie exercising a right for many years.

Examples of servitudes include access, lights, water supply/drainage and support.

Extinguishment of Servitudes

This occurs either by agreement of the parties or where both the land with the servitudes over it, and the land that benefits from the servitude becomes owned by the same party or by non-exercise for the appropriate period.

What should you do?

Consult property and legal advisers in respect of servitudes.
MGT 1.5.4  **Wayleaves**

Various statutes authorise the acquisition of rights of wayleave for pipes, cables etc, and rights of access for various purposes in connection therewith.

**What should you do?**

Seek advice from legal advisers and/or property advisers as the law surrounding wayleaves is extensive.
A planning obligation or planning agreement may restrict the use of land. A Section 75 agreement under the Planning Act 1997 may impose restrictive conditions, for example, restricting the development or use of the land, whilst provisions allowing the Crown to enter into a planning agreement are contained in Section 246 of the 1997 Act. An agreement under Section 48 of the Roads (Scotland) Act 1984 enables a roads authority to carry out works under an agreement on terms that the developer pays all or part of the costs of the works.

Agreements are enforceable against any person subsequently purchasing the land. Land may therefore accommodate certain development or road schemes that result from planning agreements and planning permission for other buildings or uses on the land may be conditional on their existence.

Agreements which are recorded in the Register of Sasines or registered in the Land Register of Scotland are enforceable.

Under Section 246 of the Town and Country Planning (Scotland) Act 1997 the Crown can enter into an agreement to regulate the use of land and this may affect the future use of land for other purposes.

What should you do?

Check title deeds to see if any restrictions apply and seek advice from property and legal advisers.
MGT 1.6.2 **Statutory Undertakers Rights**

A number of statutes concerned with the provision of public services, for example gas, electricity, transport or water, authorise certain bodies to carry out the necessary works in any particular case and these are commonly referred to as the Statutory Undertakings, notwithstanding that the gas, electricity, water and telecommunications utilities have all now been privatised. Although privatised, they retain certain rights to gain access to services over land in some circumstances, for example, under the Telecommunications Code which is contained as Schedule 2 of the Telecommunications Act 1984. This Code gives telecommunications operators effective rights to compulsorily acquire sites for their operational equipment. It also gives them a greater degree of security of tenure than they would have under an ordinary business tenancy.

Where an individual property requires and such services are available adjacent to the site, it will normally be a question of connecting to these services, in return for a connection charge. Where services are required for more than one property, or where a large development is about to take place, for example a new housing development, then the developer will make the Statutory Undertakings aware of its service requirements and the Statutory Undertakings will then make the relevant provision for services which will normally be laid in the carriageway of the roads accessing the development.

Where services are required to be provided on-site in order to cater for development, it is possible in certain circumstances for the developer to requisition the Statutory Undertakings to provide these services. The Statutory Undertakings will charge the developer for the provision of services but the charge will depend on the scale of the development proposed since there may be significant revenue income in the future which will off-set initial capital costs. Where special service plant or machinery is required, for example, a new sub-station for the supply of electricity, the landowner will need to provide a suitable room or chamber on the site and pay the capital cost of the equipment. The landowner must also ensure adequate security, and access for inspection and maintenance. The service provider can divert excess capacity to supply neighbouring developments, unless a limiting provision is written into the agreement.

Where services are provided by the Statutory Undertakings, they do not generally own the land over which or within which the services pass. The land is retained by the relevant landowners subject to rights for the Statutory Undertakings to lay services and to maintain these services and, if necessary, renew them.
What should you do?

1. Request advice from CAU as necessary on the Crown position in relation to particular Statutes.

2. Take advice from legal and property advisers on services requirements and drafting agreements.
MGT 1.7

BOUNDARY ISSUES

It is of significant importance to a landowner to establish an accurate record of the exact boundaries of the property. This is necessary for assessing what has been acquired and what is available for sale, to prevent neighbours encroaching or to know how much land is available for operational use.

Where boundaries are unclear neighbours may encroach and if this occurs without challenge over an extended period of time title to that land may be lost. In general the limitation period within which action must be taken to challenge encroachment is 10 years, but in some cases of the Crown it is 20 years.

Boundaries are delineated in a number of ways with varying complexity:

• walls and fences - walls and fences may be common property, giving rights to the parties on either side or may be exclusively owned by one party. The title deeds should be consulted;

• roads - it is normally presumed that where land is expressed as being bounded by a road, the road is excluded from the land. Where roadways are adopted by the public authorities, it is only the surface and top soil which is owned by them, not the subsoil. Where new roads are developed by the roads authorities the authority will usually have acquired the land under compulsory acquisition powers and therefore owns the land as any other landowner. Boundaries will be delineated on plans and deeds;

• rivers - the boundary is accepted to run down the middle, unless tidal, then to the mean high water mark, as the foreshore belongs to the Crown.

Alteration to boundaries is possible by agreement of the parties and must be notified to the Keeper of the Register of Scotland.

What should you do?

Check boundaries on the ground against title deeds and maintain up to date plans showing them accurately.
MGT 1.8

TRESPASS

The simple concept of trespass is not an offence in Scotland. Civil remedies are available to eject unauthorised occupiers of land. However, these will normally require the identification of individuals by name. Recent law has introduced the concept of 'aggravated trespass' and given power to police officers to remove trespassers.
VAT AND PROPERTY

Background

VAT was introduced in the UK by the Finance Act 1972, which took effect from 1 April 1973.

Between 1973 and 1989 VAT on construction, land and property was relatively straightforward:

- The construction of buildings of all types was taxable, but zero-rated;
- The sale or long lease (over 21 years) of new buildings was taxable, but zero-rated;
- The sale of old buildings was exempt;
- The sale of land was exempt.

In the mid-1980s ‘works of alteration’ became standard rated (other than to listed or protected buildings).

In 1988, however, the European Commission took action against the UK for failure to tax the construction and sale of new buildings at the standard rate. The UK successfully argued the case for zero rating on the construction and sale (or long lease) of residential buildings and certain charitable buildings. However, the UK did not win the argument on the construction and sale of commercial buildings.

In order to assist businesses making property ‘supplies’ (sales, lettings or service charges) where VAT was irrecoverable, the UK introduced the ‘election to waive exemption’ (otherwise known as the ‘option to tax’) from 1 August 1989. The ‘option to tax’ has to be done on a building by building basis. A landlord cannot elect therefore to charge some tenants in a building and not others. Once an ‘option to tax’ has been made it continues to have effect for the next 20 years on all future ‘supplies’.

In 1991 the rate of VAT in the UK increased from 15% to 17.5%.
Broadly speaking therefore the current position is that the grant, assignment or surrender of any interest in or licence over land is exempt from VAT except for:

- Certain specified transactions relating to new dwellings and charitable buildings (which are zero-rated);
- Certain ‘supplies’ relating to protected buildings which may be zero-rated; and
- ‘Supplies’ where there has been an ‘election to waive exemption’.

However, since 1990 a succession of measures have been introduced by Customs and Excise to counter VAT avoidance. These measures are extremely complex. Legal, tax and property advice should therefore be sought whenever Departments are envisaging property sales, acquisitions or leasing.

**VAT and Leases**

Generally, leases entered into after 1 August 1989 include an appropriate clause enabling the landlord to charge VAT on any payments (including rent and service charge) due under the lease.

The VAT possibilities are:

**Exempt Status**

Where the property is exempt for VAT purposes, VAT must not be added to the rent. Service charges must be charged on a gross (VAT inclusive) basis and the tenant will not be able to reclaim the VAT from Customs and Excise.

**Standard Rated Status**

Where the landlord has elected for the property to be standard rated for VAT purposes VAT must be added to the rent after the effective date of the election. Services provided to the tenants should be charged net, with the addition of VAT.
Exceptions to the General Rule

The sale of a partly completed or of a new commercial building (ie within 3 years from the date that is was completed) will attract VAT at the standard rate, which is payable by the purchaser.

A premium paid by a tenant for a lease (in addition to the rent) is exempt from VAT unless the owner has elected for the property to be taxed. Where a landlord to a tenant as an inducement it is standard rated for VAT purposes irrespective of the VAT status of the property.

A surrender premium paid by a tenant to a landlord to enable the lease to be surrendered prior to its expiry, will generally follow the VAT status of the property if the premium or penalty is two years rent, for example. However if the surrender premium can be described as an inducement then it could be standard rated.

Where a liability for VAT arises on rent or otherwise, the Department must pay it. Where Departments act as landlords to commercial tenants, Treasury guidance is that Departments should not elect to waive the exemption and therefore VAT should not be charged on the rent payable by the tenants, however, where Departments are tenants the VAT status of the property is determined by the landlord.

What should you do?

1. Refer to the “VAT – Land and Property Guide” issued by HM Customs and Excise “VAT Notice 742 (1995)”.

2. Ensure that all transactions of property are explicit as to the incidence of VAT, and which party is to pay it.

3. Seek advice from property and legal advisers.
LEASE OBLIGATIONS

Lease obligations to be undertaken by the landlord and the tenant are laid down in the lease. Obligations may be either positive, imposing an obligation on the party to undertake some act, or restrictive, where the party refrains from some act.

Usually the lease will group the tenant’s obligations in one or more sections followed by a section detailing the landlord’s obligations. However, leases should be read in their entirety to establish fully the obligations of the parties.

As well as the express obligations detailed in the lease there are also statutory implied obligations and implied obligations. Statutory implied obligations where applicable, override the terms of the lease. Other implied obligations have resulted from many years of case law and are to be assumed to be in the lease even if they are not expressly provided for or if they are limited in scope.

Where an obligation is accompanied in the lease by a right of re-entry by the landlord, the lease may be terminable if the tenant is in breach.

Where the tenant is in breach of an obligation at a lease break, the break may be judged inoperable.

It is therefore important that Departments understand and comply with lease obligations.

What should you do?

1. Take advice on your lease obligations from a property adviser.

2. Ensure that the premises users are informed about and observe any lease obligations which they may otherwise breach inadvertently.
MGT 2.2 TENANT'S OBLIGATIONS

MGT 2.2.1 Tenant's Obligation to Pay Rent

Rent is the contractual sum a landlord is entitled to receive from a tenant in return for the latter’s use and occupation of land or buildings. A lease will nearly always contain an obligation to pay rent but there is an implied obligation if it is not explicit.

The lease will usually specify the frequency of rent payments and the dates when it is due. The most commonly found being monthly, quarterly or half yearly in advance. Older leases may provide for rent to be paid in arrear. The initial amount of rent will be specified in the lease and may be subject to periodic rent reviews.

Rent should be paid to the landlord at a specified address or to an authorised agent and the onus is on the tenant to ensure that rental payments reach the landlord whether demanded or not.

A landlord may exercise the option to waive the property's exemption and charge Value Added Tax (VAT) on rent. Once waived, exemption may not be re-instated by that owner. The Department must pay VAT on top of rent where it is charged following a landlord’s option to tax.

It is permissible in some instances to make deductions from rent where the landlord is liable for certain payments however this is not an option where the lease specified that rent will be ‘without deduction’.

Although sequestration for rent (seizing goods to the value of the arrears) may not be levied against the Crown, non-payment may lead to irritancy of the lease.

What should you do?

1. Ensure that rent is paid on the due date whether demanded or not. Rent for Government occupation should not be paid by direct debit or standing order.

2. If the landlord accepts a one off reduced rental payment, for whatever reason, ensure that this is agreed in writing before a reduced rent is paid.
MGT 2.2.2 **Tenant to Repair and Decorate**

The tenant will frequently undertake to **repair** and decorate the premises, particularly in longer **leases**. Dates for internal and external decorations may be at specified intervals in the **lease** or at the end of the **term** in shorter **leases**. If no mention of decoration is made then the tenant may still be liable for works of decoration if it is under an **obligation** to keep the premises in good and tenantable **repair**.

A **repairing obligation** may be limited to fair wear and tear or to a standard no worse than a schedule of condition attached to the **lease** describing the property at the commencement of the **term**. **Obligations** requiring the tenant to ‘keep in **repair**’ carry an implied **obligation** to first put the property into **repair** and then maintain and deliver up the property at the end of the **term** in this condition.

**Repairing obligations** may use the phrase ‘**repair** and renew where necessary’. This adds little or no effect to a full **repairing obligation**. In the course of repairing a property it is frequently necessary to renew integral parts and whilst a tenant under a **obligation** to **repair** is never required to give back different premises at the end of the **lease** to that demised, it may be necessary to remedy design faults which are causing disrepair.

An **obligation** to ‘**rebuild**’ where necessary is generally considered onerous and as such may lead to a discount in the **rent** at **rent review**.

Where a tenant has not fully complied with a **repairing obligation**, on delivering up the premises at the end of the **term**, the landlord may be entitled to a claim for damages known as a **dilapidations** claim.

**Many leases** provide for the landlord to enter to carry out **repairs** and recharge the tenant following service of an appropriate **notice**.

**What should you do?**

1. Ensure a programme of maintenance is put in place, this is known as ‘**planned preventive maintenance**’.
2. Maintain a record of dates for decorations laid down in the **lease**.
3. Where notices of disrepair are served by landlords, take legal advice immediately.
MGT 2.2.3  **Tenant to Comply with Statute**

Complying with statute relates to such matters as Health & Safety, Fire Regulations, Town Planning Acts and other such regulations on the use and occupation of property.

There are three main implications of an obligation to comply with relevant statute:

- in the event of a prosecution for a property not complying with legislation, the implication is that it is the tenant who is liable and not the landlord. The covenant provides additional certainty from the landlord's point of view;

- subject to the wording adopted, the property will be deemed to comply with the statute (regardless of the case in reality) for the purposes of value at rent review. This could be advantageous to a landlord at rent review if the property, which is sub-standard in reality, can be assumed for valuation purposes to have the benefit of certain works of improvement;

- a tenant is not entitled under statute to compensation upon vacating the property for improvements carried out during the term.

**Leases** to the Crown should be drafted to the effect that the tenant undertakes to comply with statute in so far as it is binding upon the Crown. In general, Acts do not bind the Crown unless specifically stated so to do. There may, therefore, additionally be a tenant obligation to indemnify the landlord for statutes that do not bind the Crown.

**What should you do?**

Take appropriate legal advice to ensure that the implications of this obligation are fully considered at rent review.
MGT 2.2.4  **Prohibitions**

A lease will usually carry certain obligations not to do various acts. Prohibitions commonly found are:

- specific dangerous or undesirable uses of the property;
- use of common or retained parts;
- hours of use;
- storage of dangerous articles or substances;
- overloading floors;
- harmful use of drains; and
- alterations.

An example of an onerous prohibition to the Department may be against the public coming on to the premises.

Prohibitions will obviously vary from lease to lease and they should be checked to ensure that they can be complied with as some may be onerous. These may specifically affect the use to which the building is to be put. These may restrict the ability to dispose of the property in the future. An example of an onerous prohibition to the Department may be against the public coming on to the premises.
MGT 2.2.5 **User**

If the *lease* contains no express restriction on the use of the premises then subject to compliance with planning restrictions the tenant may use the premises for any legal use. However, *leases* will usually contain a user clause specifying a general or specific use that the premises may be used for at the exclusion of all others. An absolute covenant against a change of user is said to be restrictive and it may have a depressing effect on the *rental value* at *rent review* even though the initial *rent* may not reflect the restrictive use or absolute covenant.

The usual Government user is for ‘Government or other offices’ and is usually extended to include luncheon clubs and other ancillary uses. This use should extend to any Government *Department* or Agency or body carrying our functions on behalf of the Crown.

A restrictive user clause may make a *lease* difficult to assign and should therefore be avoided when taking an existing *lease* or when negotiating for a new one.

**What should you do?**

The *Department’s* property adviser should ensure that the use to which the *Department* will put the property is covered in the *lease*, but also ensure that the user clause covers other Government use and is wide enough to enable the *lease* to be disposed of. It is generally considered worthwhile paying a higher *rent* for a wide user clause to allow flexibility on *disposal*.
MGT 2.2.6 **Alienation**

The assignation or sub-letting provisions of a lease are collectively referred to as the alienation provisions.

**Assignation** is usually the transfer of a tenant's entire leasehold interest to another party, although in a few cases it is possible to assign only part of the demise.

**Sub-letting** occurs when a tenant lets all or part of the property to another party for a period shorter than its own lease. Prohibitions against or limiting alienation will usually refer to both assignation and sub-letting of all or part only of the premises. If a method of alienation is not expressly referred to then it is permissible and legal advice should be taken.

The alienation provisions of a Crown lease should contain a clause to the effect that the tenant may, without the landlord's consent, assign, sub-let or share possession with any Government Department, Agency or body carrying out functions on behalf of the Crown.
MGT 2.2.7  Tenant to Yield Up

A lease will frequently contain an obligation for the tenant to yield up the property at the end of the term (or any sooner determination) in clean repair and decoration. This may also include replacing worn or broken landlord's fixtures and fittings and making good where tenant's fixtures and fittings have been removed.

This clause adds reinforcement to the tenant's repairing covenant and ensures that the premises are left in a clean and decorated state regardless of any decoration which may or may not have been carried out during the course of the final year of term. This clause will also be taken into account in the preparation by the landlord of a dilapidation claim against the tenant.

Tenants do not generally benefit from security of tenure beyond the lease period and most vacate at the end of the term.

What should you do?

The Department should consider well before the end of the term what work needs to be done to comply with this covenant.
MGT 2.2.8 Interpretation

Many leases contain a section with definitions of the words used in the document. Leases should always be read as their own dictionary ie the meaning of words or phrases should be derived from any definitions expressed within the document.

Frequently there will be a further clause dealing with the interpretation of masculine and feminine, and singular and plural references. A further common addition is that the document should be interpreted within the context of the prevailing national law.

There is much legal precedent on the interpretation of leases and on the legality of certain clauses. Legal or property advice should be sought if there is any doubt about the meaning or legitimacy of a particular term.
MGT 2.2.9 **Disputes**

Modern leases usually provide for the resolution of disputes arising under the lease. Rent review clauses usually make separate provision for disputes concerning the revised rental.

Leases frequently specify that any disputes will be resolved by reference to the Arbitration. Arbitration procedure in Scotland is governed by ancient statute, common law and the brief Arbitration (Scotland) Act 1894.

Disputes may also be resolved by Court action taken by one party against the other for allegedly not complying with a provision of the lease. Alternative Dispute Resolution (ADR) is another option and the property advisers can advise on when its use may be appropriate.

**What should you do?**

In the event of a dispute arising which may lead to arbitration, legal advice should be sought on the interpretation of the lease terms, potential liability and likely costs of resolving the dispute.
Dilapidations (Tenant's Covenants)

Any lack of repair arising from only partial performance of a repairing obligation is referred to as 'dilapidations'. A claim for dilapidations will usually arise at the end of a lease when a tenant vacates, but a landlord is entitled to make an interim claim.

A landlord's dilapidations claim, whether during the course of the lease or at the end, should always be discussed with property/legal advisers as it will frequently be substantially greater than the landlord is entitled to or even be invalid. Any dilapidations claim should be examined critically.

Many leases contain a clause requiring the tenant to reimburse the landlord's cost of the preparation of the schedule of dilapidations.

Some leases provide for the landlord to enter the property to carry out the work, after giving reasonable notice, if the tenant does not comply.

What should you do?

1. Budget for potential dilapidations liability at the end of the lease.

2. When a schedule is received from the landlord purporting to be a schedule of outstanding works (dilapidations) immediately consult a property adviser on your rights, liabilities and remedies. Take any legal advice recommended subsequently.

3. Pass any notice to your legal advisers as soon as possible.
MGT 2.3 LANDLORD’S OBLIGATIONS

MGT 2.3.1 Warrandice

The landlord has an obligation to provide the tenant with full possession of the property for the duration of the lease. If the lease does not expressly state this obligation, there is an implied grant of warrandice to protect the tenant’s position. This warrants the tenant’s title at the date of entry and prohibits the landlord from doing anything which may encroach on the tenant’s possession, either partially or in whole, during the lease (except to the extent the lease has reserves rights to the landlord).

This obligation is narrow in scope and a claim under warrandice only arises where eviction, total or partial, has occurred.

What should you do?

Refer to legal advisers.
MGT 2.3.2 **Landlord’s Repairs**

The parties are generally free at the commencement of the lease to negotiate the repairing obligation for the premises. The landlord will generally retain responsibility for repairing the structure and common parts in the case of a multi-let building and charge some or all of this cost to the tenant via a service charge.

In some older, poorly drafted leases there may be no obligation on either the landlord or the tenant to repair. In such cases legal advice should be taken by the occupier when the building falls into disrepair.

**What should you do?**

1. As a landlord the Department should be aware of any repairing obligations.

2. As a tenant the Department should ensure that the landlord’s obligations are clearly defined in any new lease as, if the landlord is not expressly obligated, it may not have to repair.
Insurance

There is no implied obligation on either party to insure the property so this is almost always dealt with explicitly in the lease. As well as buildings insurance, leases will usually address loss of rent while a property is reinstated following destruction.

If the landlord is to insure it is usual that the landlord takes out the policy whilst the tenant reimburses the premiums by way of additional rent. If the tenant covenants to insure, the lease will usually specify what insurance cover is required. If the insurance company is not specified in the lease the landlord may still require its approval of the insurance company and proof of insurance.

Where the entire building is leased to the Crown it is usual for the Crown not to covenant to insure the property but to carry the risk itself. The lease will usually, however, make provision for the tenant to insure should it be assigned to a non-Crown body.

Ideally the lease should permit the tenant to break following destruction by an insured risk, since in such circumstances the tenant will have to relocate and may not then wish to move again following the reinstatement of the property. Such a break clause will, however, be strongly resisted by most landlords.

The insurance of the building should not be confused with the insurance of the tenant’s fixtures and fittings, which will not be covered. If such cover is required it will need to be separately insured.

Refer to ACQ 2.6 ‘Heads of Terms’ Key Issues item 9 for more detailed guidance on insurance issues.

What should you do?

1. Where necessary supply valid certificates of insurance to the landlord and obtain valid certificates from the landlord.

2. If the Crown, as a tenant, intends to carry the risk itself this should be specifically included in any new lease and the extent of the risk and liability carried recorded in writing.
MGT 2.3.4 Landlord to Provide Services

In many leases a landlord undertakes to provide services. This is common where the landlord retains common parts of a multi-let building, lets ‘serviced’ accommodation or maintains common areas of an estate. The advantages to a landlord are that it retains a degree of control over the property and can maintain it to the desired standard: important in the case of a multi-level building or estate where new lettings may be required. The obvious disadvantage is that it involves a large degree of management.

The advantage to a tenant of a landlord covenanting to provide services is that they become an obligation and the tenant is assured that essential services such as heating and rubbish removal are carried out and the tenant may sue for non-compliance with an obligation, if necessary. The disadvantage to a tenant is that it has little control over the provision of the services and their cost efficiency. Unless separate tenant’s meters are installed, the benefits of one tenant achieving reduced energy costs is shared by all tenants. This provides little incentive to any one tenant to reduce costs. It may be also that the landlord refurbishes common parts beyond the standard required by the tenant and the rental value of the premises is therefore higher at rent review than might otherwise have been the case.

What should you do?

1. As a tenant taking a new lease the Department should ensure that only the required services are provided by the landlord and that those services over which the tenant wishes to retain control are not included in the landlord’s covenant.

2. The Department should monitor both the quality and cost of services provided and challenge as appropriate.
**MGT 2.4**

**ENFORCEABILITY OF OBLIGATIONS**

**MGT 2.4.1**

**Enforceability Upon Assignation**

Following a permitted assignation in terms of the lease, the tenant is released from any future liability, excepting rent and other sums due up to the date of assignation. There is no privity of contract prescribed by statute. This creates an important distinction between assignation and subletting.

A form of privity of contract can be implied where the lease contains an express provision making the tenants jointly and severally liable with their successors and future assignees for the performance of their leasehold obligations.

Because of this, Scottish commercial leases will usually provide protection to the landlord by making it permissible for them to refuse consent for assignations except to assignees of similar financial status to the assignor.

**What should you do?**

Take legal advice on issues of privity of contract/joint and several liability.
Landlord’s Remedies

Rent

A landlord has three main remedies for non-payment of rent:

• hypothec;
• diligence; and
• irritancy.

Hypothec, although seldom used, involves seizing tenants' goods to the value of up to one year's rent. The right is subject to statute and common law and is enforceable through the courts by raising an action of sequestration of rent.

Diligence, also seldom used, bypasses the court system and therefore speeds up the process of collecting rent arrears. It is enforceable by a sheriff officer using an executed copy of the lease.

Limited Statutory protection is given to tenants in the event of the landlords irritating the lease for non-payment. After the irritancy has been incurred the landlord must give the tenant a further 14 days written notice to pay the arrears due.

Other Breaches

A landlord may be entitled to damages for breaches of non-monetary obligations. The ability of the Courts to grant specific orders in respect of the non-compliance of the tenant with positive and negative obligations cannot be generalised on.

Landlords may irritate the lease in the event of breach of non-monetary obligation. Statute gives the tenant the opportunity to remedy breaches, introducing the test of a fair and reasonable landlord.

What should you do?

1. As a landlord the Department should give due consideration to the best remedy in the circumstances and whether irritancy would be advantageous.

2. A tenant should act immediately upon receipt of written notice of irritancy and take professional advice.
Tenant's Remedies

There are three main remedies available to the tenant for a breach of obligation by a landlord such as a failure to repair:

• a claim for damages;
• deduction of costs from rent; and
• specific implement.

A claim for damages would have the effect of putting the tenant in the position it would have been in if there had been no breach, this may include the cost of alternative premises or disturbance in the case of a substantial lack of repair.

A tenant may deduct (or retain) from the rent the cost of carrying out repairs which fall under the landlord's obligation only when the lease does not specify that rent shall be paid without deduction (or retention).

The Court has discretion to order specific implement of a landlord's obligation. This will only be made in cases where there is definite and specific work to be done. The Court may also issue an interdict to prevent the landlord from carrying out some action prohibited by the lease.

In the event of a significant breach by the landlord, ultimately the tenant may be able to rescind entirely from the lease. In practice this is extremely rare and what amounts to a material breach is a matter for the courts.

What should you do?

1. Due consideration should be given to employing an appropriate remedy when a landlord persists in non-performance of an obligation.

2. Legal advice should be sought on the enforceability of the obligation, appropriate remedies in the circumstances and the likely extent of any damages.
MGT 2.5  

**RENT AND SERVICE CHARGES**

Refer to ACQUISITIONS 2.6 ‘Heads of Terms’ for further guidance on Rent and Service Charge.

MGT 2.5.1  

**General**

**Rent**

Rent is a contractual periodic payment made by the tenant to the landlord for the use and occupation of the landlord's land and buildings. There are various names for different types of rent, some of the most common being ‘rack rent’, ‘ground rent’ and ‘peppercorn rent’.

A ‘rack rent’ or ‘market rent’ is the full annual letting value of a property on a given set of terms and conditions.

A ‘ground rent’ is less than a ‘rack rent’ and generally represents a rent for the undeveloped land on which a building may now stand.

A ‘peppercorn rent’ is effectively a nominal rent.

The ‘passing rent’ is the rent currently payable under a lease or tenancy.

**Service Charge**

A service charge is an amount paid by the tenant on account of the services provided by the landlord. A service charge can include many different items of expenditure incurred in the provision of services to the building. Some of the most common services provided by the landlord include heating, lighting, cleaning and repairs. Efforts should be made to require separate metering so that service charges reflect the actual costs incurred by each tenant.

In many leases the service charge is reserved as ‘rent’ to the landlord and therefore non-payment of the service charge enables the landlord to recover the monies as arrears of rent. This should be avoided if possible.
**Payment of Rent**

A lease will usually require rent to be paid in advance often becoming due on the Scottish quarter days or days specified in the lease. Sometimes, however, rent is paid in arrear.

The lease will usually state the amount of rent and frequency of payment and it is important to note that rent becomes due **whether formally demanded or not**. Rent should also always be paid to the landlord or its authorised agent. The onus is on the tenant to ensure that the rent reaches the landlord.

Leases often provide for the landlord to charge interest on arrears of rent after a specified period of days grace. The interest is generally charged on a daily basis after becoming due, although in some leases no period of grace is granted.

If rent is not paid by the due date, the landlord can take various forms of action against the tenant to recover the rent.

The Department should not pay rent by standing order or direct debit.

**What should you do?**

1. Create and maintain a record of the rent paid at each property and when payments become due to the landlord.

2. Create and maintain a record of all rent review dates, in order to trace any changes in the rent paid at the property.

3. VAT may be payable on the rent.
# Quarter Days

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**Key:**

- **UQD** - Usual Quarter Days
- **NQD** - New Quarter Days
- **CED** - Crown Estate Days
- **SQD** - Scottish Quarter Days
- **NSQD** - New Scottish Quarter Days
- **NIQD** - Northern Ireland Quarter Days
  (or **GQD** Gael Quarter Days)
MGT 2.5.3  **Authorising Payment of Service Charge**

A service charge demand will usually be issued by the landlord or its authorised agent shortly before the monies become due. The demand does not have to follow a prescribed form although it should be addressed correctly, state the amount due and the period to which it relates.

A service charge demand is a charge to the tenant, which relates to the cost of the services provided by the landlord. In many cases, the service charge appears on the landlord’s rent demand as it often becomes due for payment at the same time as the rent. When a service charge demand is received, the lease should be carefully checked to see whether the landlord is permitted to charge for all the services contained in the service charge and that the costs are reasonable.

See ACQ 2.6 ‘Heads of Terms’ Key Issues item 8 for detailed guidance.

**What should you do?**

1. Create and maintain a record of all service charge invoices that are paid.

2. Instruct property advisers to check the lease to ensure that only permitted services are being charged for and that costs are reasonable. They should also ensure that all the services that the landlord should provide have been delivered and the benefits of any reductions in resource use accrue to the appropriate tenant.

3. VAT may be payable on the service charge.
**MGT 2.5.4 Challenging Invoices**

The frequency and level of rent paid in respect of a property is usually specified in the lease and therefore disputes are relatively rare. They may arise, however, where a rent review is effective from a date other than a quarter day when rent payments are due and it is necessary to apportion the revised rent. In cases of dispute referral may be made to the Apportionment Acts. In the case of service charge, however, disputes often arise and this is an area which requires careful scrutiny.

The lease will usually state that the service charge is to be paid in advance, together with the rent. A service charge, however, unlike rent, will vary from period to period and the accounts should be reconciled on a yearly basis.

The lease will often clarify the costs of which services provided by the landlord can be recouped from the tenant together with the period of the service charge financial year. In many cases, the landlord or its authorised agent will be required to provide an annual budget for the services that will be provided throughout the year. The budget will then be apportioned between the occupiers of the building and on account charges made with rent demands.

The most common reasons for challenging service charge invoices are because the previous year’s accounts have not been reconciled, the landlord is charging for items which it is not able to recover under the terms of the lease or the cost of the services provided are unreasonably high.

**What should you do?**

1. Create and maintain a record of previous years’ service charge budgets and end of year reconciliation. This may be done by property advisers.

2. Note the date when the end of the year service charge reconciliation is due. This may be done by property advisers.

3. Instruct legal or property advisers to advise upon the steps that are available to the tenant to challenge an invoice in the event that it is incorrect or contains non-recoverable items.
Disputes

When disputes arise with the landlord over the payment of rent and service charge, the tenant should not withhold rent in an attempt to resolve the matter. If rent is withheld, the landlord is likely to take action against the tenant, which could result in the lease being forfeited.

Leases will usually incorporate a clause for the resolution of disputes arising under the lease. In many cases, the lease will state that the dispute is to be resolved by reference to an arbiter.

On some occasions the tenant can delay or stop the payment of service charge at a property if the landlord is not prepared to clarify queries which have been raised in relation to the service charge. It is very important to note, however, that service charge is often reserved as rent under the terms of the lease and therefore the landlord may take action against the tenant to recover the service charge as arrears of rent.

What should you do?

In the event of a dispute between the landlord and a tenant, instruct legal or property advisers to assess whether the service charge may be withheld and the likely success of any action.
MGT 2.6  

**RENT REVIEWS**

Refer to **ACQUISITIONS 2.6 ‘Heads of Terms’** for further guidance on **Rent Review** clauses.

MGT 2.6.1  

**General**

Provisions for the negotiation of the review of the current **passing rent** are normally provided within the **lease** document. **Modern leases** frequently provide for the review of **rent** at five yearly intervals although three and four yearly are also common. The **rent review** clause will normally include:

- the definition of **rental value**;
- notice provisions;
- procedures in the event of dispute.

The majority of **rent review** clauses are drawn on the basis of the reviewed **rent** being the same or higher than the **passing rent** (‘upwards only’). There are some **leases** however that can be reviewed upwards and downwards. In certain cases the **rent** may be reviewed to a fixed amount set out in the **lease**.

The **Department** should avoid setting a **market rent** by agreeing a **rent review** when other Crown **rent reviews** may be forthcoming in the same building or in close proximity. **PACE** will advise on strategy in such circumstances.

Where the **Department** is the landlord under the **lease** it will be necessary to decide upon the service of notice and the **rent** to be quoted.

Where the **Department** is the tenant it may be necessary to instigate the review if the **rent review** is upwards and downwards and the **rental value** is less than the **passing rent**.

**What should you do?**

1. Create and maintain a record of all **rent review** dates, noting where **rent reviews** are upwards only or upwards and downwards.

2. Instruct property advisers to advise on notice procedure, implementing the review, **rental value** as defined by the **lease**, possible points of law and negotiation strategy.
MGT 2.6.2  Notices

The notices to be served to activate rent reviews are set out in the rent review clause within the lease. Counter notices are often provided for, ie a response by the party receiving the notice. These notices are commonly referred to as 'trigger' notices. The notice provisions in a lease will normally specify:

• who can serve the notice;
• time limits, if any; and
• procedure for counter notice.

Leases can often be silent as to the service of notices or counter notices. In these cases it will not be necessary to serve a formal notice. However, it is advisable to document the commencement of the negotiation in writing to the other party. In some cases time limits are, or can be interpreted as being, strict where 'time is of the essence'. This means that time limits must be strictly observed. This may be the case even though the words are not used specifically, eg where a rent review is coupled with a tenant's break option.

Where a rent review clause is upwards or downwards and the rental value is below the rent passing in the lease it will be necessary for the tenant to instigate the review. The notice provisions should be consulted.

Failure to meet time limits where ‘time is of the essence’ can result in landlords losing the review, or deemed acceptance of the rent quoted by the landlord in the case of failure by the tenant to serve a counter notice in time.

What should you do?

1. Create and maintain a record of all notice dates.

2. Instruct property/legal advisers to serve and respond to notices. Advisers should check whether 'time is of the essence' but in any case keep to defined time limits and be ready to serve a notice on a landlord where the rent is upwards or downwards and a reduction is anticipated.
**Definitions of Rental Value**

When the rent review is not to a fixed amount there will be a definition of rental value in the lease to which the rent is to be reviewed at the specified review date. Definitions will usually have references to the prevailing rental values at the review date but there are often 'assumptions and disregards' which will affect the reviewed rent of the property.

Assumptions commonly found are:

- willing lessee;
- willing lessor;
- vacant possession; and
- similar lease terms to the existing lease.

Disregards commonly found are:

- the actual tenant's occupation;
- any goodwill attached to the premises for the current tenant's business;
- improvements made to the premises by the tenant; and
- failure of the tenant to comply with the lease terms.

Disregards may also apply to the interpretation of rental transactions on comparable properties. Tenants should resist disregards of the landlord's failure to repair.

In the absence of any of these matters being disregarded the rental value of the premises may be higher, particularly in the case where there are substantial tenant's improvements.

**What should you do?**

Seek advice from your property adviser who should be fully aware of the current case law on rent review and the interpretation of clauses. This is an area of law which is continually subject to new precedent.
Negotiations

Where the rent review is not to a specified amount in the lease, negotiations usually commence to establish a revised rent given the assumptions of the rent review clause. Discussions will normally be initiated by one party, usually the landlord but sometimes by the tenant, where the review is upwards and downwards, quoting the revised rental whereupon it is for the parties through their property advisers to agree an appropriate rent.

Negotiations will usually centre around comparable rental evidence such as open market lettings, lease renewals and other rent reviews on similar properties. Departments should consult PACE for information regarding other Government lettings or rent reviews. It is important that any correspondence between landlord and tenant or their agents during the course of negotiations should be clearly marked ‘without prejudice’. In this way any offers or concessions made cannot be used against that party in later dispute resolution procedure.

Ensure all correspondence concerning a rent review is clearly marked ‘without prejudice’ other than when the correspondence purports to be a formal notice or counter notice. Such notices should be dealt with by the legal and property advisers.

Further to the Requirements of Writing (Scotland) Act 1995 care should be taken when referring to rent reviews verbally or in written correspondence. Caveats excluding discussions and letters from any legally enforceable contract should be clearly stated.

What should you do?

1. On receipt of a landlord’s quotation of rent under a rent review clause seek property/legal advice immediately in case a counter notice is required and instruct your property adviser to negotiate where necessary.

2. Liaise with PACE and exchange information under the terms of the CEC A.
**Report and Recommendations**

When the property advisers appointed to negotiate the rent review reach a provisional agreement with the other party they should submit a report on the negotiations and a recommendation to settle the rent review at that figure.

The report should briefly set out the progress of negotiations and any offers made and received and an analysis of the provisional settlement. The report should be accompanied by the full pattern of rental evidence put forward by both sides.

**What should you do?**

Read the report and decide whether or not to accept the adviser's recommendations. If in doubt, consult PACE.
Disputes

Rent review clauses will usually provide for the determination of the reviewed rent if it cannot be determined by negotiation. The most common methods are by an independent expert or an arbiter. The Government generally prefers arbitration. The lease may provide time for the parties to agree on a third party, or the landlord or tenant may have to apply to the Scottish branch of the Royal Institution of Chartered Surveyors (RICS) for appointment of one.

There may be a timetable or notices to be adhered to in order to protect the respective parties' right to a third party determination.

There are many differences between the rights and duties of an expert and an arbiter. Whilst an expert is independent and does not have to have regard to submissions by the parties, an arbiter is quasi-judicial, and must arbitrate between the two parties' valuations having regard to their evidence. Whilst an expert may use market knowledge, arbiters should make a decision on the evidence put before them.

An arbiter (and in some cases an expert) can receive submissions on the costs of the proceedings after issuing a determination. It is possible to make an offer to settle the dispute prior to a third party's determination which, if not accepted by the other party and bettered by the determination, may ensure some or all of the costs are awarded against the other side. This is known as a ‘Calderbank Offer’ and advice should be sought from a property adviser on this issue.

What should you do?

1. Keep a record of deadlines for notices within a rent review timetable.

2. Instruct a property adviser to prepare representations to the third party, particularly in the case of arbitration where the weight of the evidence and opinions provided by the adviser are under examination. It is sometimes necessary for one party to decide which method of dispute resolution they would prefer.

3. Seek advice from the property adviser on the level of a ‘Calderbank Offer’, if appropriate.
Documenting the Review

The rent review clause in the lease will often state that the agreed or determined revised rent should be documented by way of a memorandum signed by both parties and annexed to the lease. This generally contains brief lease details, the rent review date and the revised rent. It is advisable to document a review in this way even if the lease does not require it as this can be produced to a potential assignee as proof of what was agreed.

Even if there is no change in the rent following a review the agreement should be documented to avoid potential disputes later.

Memoranda should be attached to the lease for security even if the review resulted in null increase in rent.

What should you do?

1. Ensure that, following agreement of a rent review, the new rent is formally documented by property or legal advisers.

2. Inform PACE of the result of the rent review in accordance with the terms of the CECA.

3. Update your property management database.
Interest

Where a rent review dispute continues beyond the rent review date, rent will normally continue to be paid at the level payable before the rent review date. Most modern leases provide for interest to be paid by the tenant on underpaid rent if an increased rent is determined after the review date. The rate will be prescribed in the lease.*

Occasionally, in the case of upwards or downwards reviews where a lower revised rent is determined after the review date, interest will be payable by the landlord on overpaid rent.

Where a lease does not explicitly provide for interest there is no implied term and therefore interest is not payable.

*In new leases to the Crown the preference is for there to be no requirement to pay interest on revised rents agreed after the review date. But if that cannot be negotiated the interest should not exceed the prevailing bank base rate.
**BREAK CLAUSES**

Refer to **ACQUISITIONS 2.6 ‘Heads of Terms’** for further guidance on Break Clauses.

**MGT 2.7.1 General**

Many leases now contain break clauses (sometimes referred to in leases as options to determine the lease) which allow one or both parties to break the term with no further liabilities. In a poor and uncertain economic climate they can allow a tenant a degree of flexibility as it need not be tied into a long lease which it may not be able to assign.

Break clauses provide a valuable opportunity for a tenant to reappraise its property requirements. At least two years prior to a break the Department should start to consider its options and prepare property plans to take account of both the needs of the business and the estate management perspective.

In the case of jointly occupied buildings it is the duty of the Holder (usually the major occupier) to take the leading role in the break clause strategy and the service of notices. This role is set out in the Departmental Estate Occupancy Agreement (DEOA).

A ‘tenant’s only’ break clause is most favourable to the tenant. Government Departments should prefer ‘tenants only’ breaks.

Breaks are usually effective upon specific dates in the lease or upon the occurrence of a specific event such as the granting of planning permission.

The advantages of a Break Clause will usually be paid for in increased rent.

**The Courts will not allow (except in very isolated cases) notices exercising breaks that are served incorrectly or late.**

**There is sometimes a rental penalty payable if a tenant exercises an option to break.**

**Lease terms** should be considered carefully as a tenant’s break may fail if all of the tenant’s covenants have not been complied with. These covenants are known as the ‘conditions precedent’ and they are strictly enforced.

**What should you do?**

(see over)
What should you do?

1. Instruct property advisers to advise on the property plan given the existence of a break, the service of notices, any conditions precedent for breaking the lease and any financial penalties or dilapidations liabilities.

2. Instruct legal advisers to serve notices to exercise such break options, either on behalf of the landlord or on behalf of the tenant.
MGT 2.7.2  Notices

The break clause in a lease is usually operable by the service of a notice by the party wishing to determine the term.

It is vital that the notice is served within the required time prior to the date of the break. The Courts will rule a notice as invalid if served late or incorrectly.

What should you do?

1. Maintain an accurate register of dates for the service of notices to break and ensure that these can be considered well in advance.

2. Instruct legal advisers to advise and serve notices where required.
Interpretation and Time Limits

A break clause will often contain wording to the effect that the property must be repaired and decorated and there must be full compliance with all the obligations in the lease. If this is the case, it is a ‘condition precedent’ to breaking the lease and is potentially extremely onerous as the notice of intention to break will be void if the landlord can prove that an obligation has not been complied with by the date referred to (usually the date of the break).

A way to overcome this problem is to agree a settlement for the landlord’s dilapidations claim well in advance of the date for the break and obtain the landlord’s assurance that this sum is for complete and final settlement and releases the tenant from any obligations and liability under the lease.

What should you do?

Seek legal advice on all issues concerning lease breaks. Legal advisers should be aware of any conditions which must be met before a lease can legitimately be broken and advise on dilapidation claims where necessary.
MGT 2.7.4  **Security of Tenure**

Commercial leases in Scotland do not generally grant tenants security of tenure beyond the period of the lease.

If the landlord wishes to break a lease where an option to break exists, it may do so assuming the correct notice procedure set out in the lease is followed.

**What should you do?**

The Department as a landlord should ensure dates for break Notices are clearly timetabled and served by legal advisers.
MGT 2.8.1 General

In most commercial leases in Scotland the tenant does not benefit from security of tenure, assuming the service of due written notice prior to the expiry of the lease.

The landlord may wish to grant a lease renewal. In instances where the market has risen since the last rent review, the landlord should issue a notice to quit in the requisite form, with a covering letter specifying the revised terms on which a new lease would be granted.

The terms of a new lease, including rent, are a matter of negotiation between landlord and tenant.

In the case of a jointly occupied property the duty of receiving and serving notices is on the Holder and this duty is reflected in the Departmental Estate Occupancy Agreement (DEOA).

The property adviser will negotiate the Heads of Terms with the other party and liaise with the Department's legal advisers who will agree the wording of the lease with the other party's legal adviser. The property advisers should liaise with the legal advisers on the valuation aspects of the draft lease. All exchanges between advisers should be subject to Departmental approval and marked 'without prejudice'.

The following flowchart illustrates the procedures to be followed when an option appraisal has resulted in a decision to renew an existing lease at expiry.

What should you do?

Property advisers should be instructed to advise on tactics for serving notices, new lease terms to request, rental value and negotiation tactics.
LEASE RENEWAL PROCEDURE

STAGE ONE

Where Lease Renewal is the Preferred Option

1 Year Prior to Expiry, Property Adviser provides Premises Manager with Updated Report giving advice on:

- Rent and Financial Implications
- Timetable for Renewal Procedure
- Tactics to be adopted in Renewal Process

Premises Manager Decides upon Lease Renewal Terms Required and Advises Property Adviser

Property Adviser Commences Lease Renewal by:

- Inspecting and measuring the premises
- Assembly and analysis of comparable evidence
- Negotiation with Landlord, Tenant or others

On Completion of Negotiations, Property Adviser provides Report to Premises Manager, on Provisional Terms Agreed

Premises Manager Consults in accordance with Departmental Policy on whether Terms are Acceptable and Advises Property Adviser to either:

- Accept Terms Proposed
- Renegotiate Revised Terms

CONTINUED ON NEXT PAGE
LEASE RENEWAL PROCEDURES (CONTINUED)
STAGE TWO

Premises Manager Advises Property Adviser to Accept Provisionally Agreed Lease Terms

Property Adviser Confirms Acceptance with Landlord, Tenant and Other Party

Premises Manager Instructs Legal Advisers to Complete Legal Documents

Legal Advisers Forward Lease Documents to Premises Manager for Signing and Sealing

Premises Manager Returns Legal Documents to Legal Adviser to Allow Completion to Take Place

On Completion Legal Documents are passed to Premises Manager for Storage

Premises Manager Ensures that the Property Records Database is Updated

Premises Manager Advises Finance Division of New Payment Details for Rent and (where applicable) Service Charge in accordance with Departmental Instructions

Finance Division Makes New Payment(s) from Agreed Dates
MGT 2.8.2  **Terminating the Lease**

Commercial tenancies may generally be terminated by either party. The lease may specify minimum periods of notice which must be complied with. If the lease is silent as to notice periods, in order to prevent the lease continuing for a further year on the same terms and conditions and at the same rent under the process of ‘tacit relocation’, written notice must be provided whether the Department is landlord or tenant in the requisite form at least 40 days prior to the lease expiry date (although longer notice will be required for non-urban subject or where 2 acres or more are let and legal advice must be taken).

In the case of shops only, if the tenant is unable to negotiate a renewal on satisfactory terms after receipt of a notice to quit, he may apply to the court for a renewal of the lease for a lease not to exceed one year on such conditions as the court considers reasonable. Further applications may be made to the court at the end of each extended lease period.

**What should you do?**

1. Instruct legal/property advisers to serve and reply to Notices and surveyors to negotiate lease renewal if appropriate. It is vital that the timetables for Notices and applications to Court are adhered to by both parties and Notices must sometimes be in a specific format.

2. Liaise with the other occupiers in the case of a jointly occupied building (JOB) in accordance with DEOA.
MGT 2.8.3 **Landlord’s Opposition to a New Lease**

Tenants of shops can benefit from a form of security under which they may apply to the Sheriff Court for a renewal of the lease for a period not exceeding one year. The Tenancy of Shops (Scotland) Act 1949 lays down six grounds upon which a sheriff may refuse renewal. These grounds are as follows:

- tenant in breach of material tenancy condition;
- tenant is bankrupt;
- offer by landlord to sell the tenant the premises;
- landlord has offered the tenant suitable alternative premises on reasonable terms;
- tenant has given landlord notice to quit; and
- greater hardship caused by renewing than by refusing the application.

For tenants of offices, if terms for a new lease cannot be agreed, there is no right to remain in occupation if the landlord has served notice.

**What should you do?**

Legal advice should be sought to clarify the definition of ‘shop’ for the purposes of the Act.
Compensation for Tenant's Improvements

Tenants in Scotland have no statutory rights to compensation for improvements made to the premises during the period of the lease. Unless the lease makes provision for the payment of compensation, none will be payable.
**MGT 2.8.5**

**Dilapidations (Lease Expiry)**

If the legal repairing and alterations obligations contained within the lease and/or licences have not been met upon expiry, a claim for damages for breach of contract may arise. Landlords will frequently claim substantially more than they are entitled to and the ultimate sum, if any, will usually be the result of negotiation. Depending upon the circumstances the claim may be made at any time within the 12 years after the lease has expired. *Any claim could be the first step in a series of events which might end in a Court action.*

The extent of the damages depends on the reduction in value to the landlord of the premises when they are handed back, and the intended use to which the building is to be put when the tenant vacates. For example if it can be shown that as at the date of lease expiry there was a settled intention for the property to be substantially structurally altered then the damages will be greatly reduced. Where the intention at the date of lease expiry is demolition, no claim for damages will be valid.

To avoid a claim in the first instance a tenant should instruct legal and property advisers *well in advance* of the end of the lease to consider the repairing obligations and extent of repairs required. The advice of a services engineer may also be required, depending upon the complexity of the property.

Legal advisers will identify any grounds for revisiting the claim. If the claim is legitimate and having regard to the circumstances, the property advisers will recommend whether to carry out building works, agree a financial settlement or agree with the landlord to do nothing.

Some leases, or their related licences for alterations, will have a clause requiring reinstatement of the landlords fixtures or reinstatement to the property's condition prior to being altered. This should not be compared with dilapidations liability arising from a repairing obligation.
What should you do?

1. Take advice to minimise the amount of ‘terminal’ dilapidations by maintaining the premises in good condition.

2. Instruct property/legal advisers well in advance to advise upon the best course of action to be taken with regard to the dilapidations liability.

3. If the lease has expired and a claim is made, instruct property/legal advisers to agree the extent of damages (if any).
MGT 2.9  
**ALTERATIONS AND IMPROVEMENTS**

Refer to **ACQUISITIONS 2.6 ‘Heads of Terms’** for further guidance on alterations and improvements.

MGT 2.9.1  
**General**

An alteration is any work which changes the form and constitution of a building. Any work that merely alters the appearance of the building, such as the erection of an advertising sign on an external wall, is not an alteration.

It is necessary to consider whether an alteration is an improvement as there are statutory implications upon the granting of the landlord’s consent where proposed works are improvements.

Any alterations that result in improved environmental performance, e.g., lighting and heating cost reductions, may also be considered improvements.

Leases normally provide for landlord’s consent to be obtained prior to alterations being carried out. **Departments should always ensure that consent is obtained if necessary and that sufficient time is allowed for obtaining that consent. Departments should on no account undertake alterations without consent.**

Departments may need to make alterations or improvements in order to comply with the Disability Discrimination Act 1995.

**What should you do?**

Take advice from property advisers on whether the landlord’s consent is required.
MGT 2.9.2  

**Landlord’s Consent**

It is common for a landlord to insert an express prohibition against alterations to the demised property to protect it from substantial change and possible damage. A prohibition can be either qualified (i.e., consent may not be withheld unreasonably) or absolute, forbidding alterations altogether.

**Disability Discrimination Act 1995**

The Disability Discrimination Act (DDA) 1995 (which applies to the Crown) makes discrimination against disabled people an offence. In particular, the Act protects disabled people from discrimination in the field of employment. As part of this protection, employers may have to make ‘reasonable adjustments’ to their premises so that disabled people are not at a substantial disadvantage compared with non-disabled people. Part III of the DDA requires Departments that are considered to be ‘service providers’ under the Act to ensure that works required to meet the provisions of Part III of the Act have been correctly identified and programmed for completion to comply with the 1 October 1999 and January 2004 deadlines. The first stage towards compliance is an access audit of the building. Remedial action identified can then be priority rated to form the basis of a compliance programme. Take advice from property and legal advisers on the latest requirements of the Act.

Special provisions apply to leasehold property, where a lease would otherwise prevent a ‘reasonable adjustment’ involving an alteration to premises. The Act modifies the effect of a lease as far as necessary to enable the employer to make the alteration and requires the landlord not to withhold consent unreasonably. This includes leases which currently prohibit any alterations to property. There is provision for any disputes to be referred to an Industrial Tribunal.

**What should you do?**

1. Ensure that the landlord’s consent is obtained prior to making a decision.

2. If the Department is a tenant, consideration should be given to the remaining period of the lease, and thought given to agreeing with the landlord a lease extension to ensure full use of the improvements.

3. If the Department is a landlord, it should give due consideration to carrying out a tenant’s proposed alterations itself as they may be reflected by a higher rent at rent review whereas the tenant’s own improvements are likely to be disregarded.

4. Comply with the requirements of the DDA.
MGT 2.9.3 **Documentation**

Once landlord’s consent for alterations has been obtained it should be formally documented. This is usually by way of a ‘Licence for Alterations’. This will record the landlord’s consent and any conditions and provisos.

An important issue to be addressed is whether the alterations are to be taken into account at rent review. Leases commonly require tenant’s improvements to be disregarded for the purposes of arriving at rental value but a licence may override this. Departments should avoid having improvements rentalised at rent review as they will effectively be paid for twice.

The parties may agree on a period of time in which the alterations must be carried out and this will be specified in the licence. Parties should be aware of any time limits and adhere to them.

Another important issue sometimes covered by a ‘Licence for Alterations’ is a reinstatement clause in the lease. The licence often requires the tenant to return the property to its original specification. If the tenant does not comply with this the landlord can seek damages, but only where it can be shown that a loss has been suffered.

**What should you do?**

1. Departments as both landlord and tenant should take particular care when negotiating the terms of the ‘Licence for Alterations’.

2. Legal advice should be sought on the drafting of such a document to ensure that improvements are not rentalised at rent review.
MGT 2.10 **SUB-LETTING AND ASSIGNATION**

Refer to [ACQUISITIONS 2.6 ‘Heads of Terms’](#) for further guidance on Alienation (assignation or sub-letting) clauses.

MGT 2.10.1 **General**

Sub-letting is the granting of a lease by a tenant whilst assignation involves the transfer of the entire leasehold interest to another party. They are collectively known as alienation. Leases usually contain provisions expressly dealing with alienation of the whole or any part of the property. A lease may make specific provisions where a tenant wishes to assign or sub-let such as a requirement to first offer a surrender to the landlord. It is important therefore to be aware of the actual provisions contained in the lease.

**What should you do?**

Whether the Department is a landlord or a tenant it is advisable to seek the opinion of a legal adviser on the interpretation of the alienation provisions in the lease prior to it taking place.
Landlord’s Consent

As in the case of alterations, a landlord’s prohibition against alienation may be either qualified or absolute. In the case of a qualified prohibition, because statute does not impose the test of reasonableness on the landlord, leases commonly state that landlord’s consent to alienation is not to be unreasonably withheld. To remove some ambiguity from this qualification and prevent a diminution in the covenant strength of their tenant, landlords often seek to add suitable wording to prevent assignations and sub-lettings to tenants of lesser financial standing than the existing tenants.

In the case of an absolute prohibition against alienation, the landlord is quite entitled to withhold consent unreasonably or to impose onerous conditions on the grant of his consent.

Alienation occurring without landlord’s consent does not provide security of tenure for a sub-tenant. The landlord could irritate the Head tenant’s lease and obtain damages from the Head tenant.
MGT 2.10.3  **Terms of New Letting/Assignation**

A tenant wishing to sub-let is in effect making itself a landlord and should therefore ensure that no terms are too unfavourable to itself. The existing lease may require certain items to be included, for instance no further sub-letting to be allowed or sub-letting not to be less than the market or passing rent of the property.

A sub-lease must be of a term shorter than the headlease. This is because a tenant cannot create an interest in the property greater than its own.

The other important factor to address is dilapidations (particularly schedule of condition).

**What should you do?**

Property advisers should be instructed to negotiate Heads of Terms with the new tenant or assignee. They should advise on appropriate terms for inclusion in the sub-lease, security of tenure for the head tenant and dilapidations.

ACQ 2.6
MGT 2.10.4 **Notices**

Once an assignation or sub-letting has occurred a *lease* may require notice to be given to the landlord within a certain period of time. This is usually for the purpose of noting of these tenant's interests by the landlord.

Under Scottish law an assignation is not completed until intimated to the landlord.

*A tenant should be aware of any time limits for notices and adhere to them.*

The landlord may also require notice of the terms to be contained in a proposed sub-lease in order to approve them.

**What should you do?**

1. Ensure that legal advisers are aware of any notice requirements in the *lease* in connection with *alienation* and adhere to any time limits.

2. Ensure any assignation is intimated to the landlord by legal advisers.
Security of Tenure

Tenants of commercial premises in Scotland have security of tenure throughout the period of their lease provided they are not in breach of any of their obligations.

Subtenants are responsible for the performance of their obligations to their immediate landlords, the tenant, who himself remains liable to the head landlord. The subtenant acquires no security of tenure from the head landlord. If the head lease is terminated, the subtenant’s right of occupation comes to an end.

What should you do?

1. Take legal advice on security of tenure matters.

2. Avoid granting licences.
MGT 2.10.6  

**Dilapidations (Assignations)**

**Assignation of Lease**

When a lease is assigned the existing and future dilapidations liability will transfer to the new tenant (assignee). It is not uncommon, therefore, for any premium or reverse premium paid for the lease to reflect outstanding dilapidations at the time of assignation.

**Sub-letting**

The Department should be aware that there may be a residual reinstatement or dilapidations liability even if the sub-tenant has a full repairing lease. This will arise where certain alterations made by the Department are included within the sub-tenant’s demise (area occupied). The sub-tenant, although fully repairing, will be under no duty to reinstate the property to its original condition prior to the alterations and this will remain with the Department when the headlease expires.

Sub-tenants may require their repairing covenants to be limited to the condition of the property when they occupied it. This can be done by means of a schedule of condition and a repairing covenant requiring repairs to no better standard than the schedule describes. This is often the case in short sub-lettings of older property.

**What should you do?**

1. Instruct legal advisers who should ensure that any dilapidations liability has been addressed prior to assignation or sub-letting and that any residual liability following a sub-letting has been assessed as far as possible.

2. Instruct property advisers to prepare a schedule of condition where necessary.
**NOTICES**

Special care should be taken when sending any notice under a lease to the landlords or sending any important communication or correspondence to the landlords or their agents to ensure that it complies with any formalities in regard to service specified in the lease. Leases often contain a clause setting out requirements relating to notices including where they should be sent and the method of service.

**What should you do?**

Instruct property or legal advisers to check the lease carefully to establish the correct address for service of notices on the landlord and the correct methods of service.
MGT 3.0  MANAGEMENT OF SUB-LETS

Where surplus space has been sub-let it will be necessary to arrange for the management of the tenancy. Sub-lettings may have been inherited at the time of the Department taking over the management of the building or subsequently as a result of rationalisation of space. Services will need to be provided to the sub-let space, rent and service charges collected, lease obligations monitored to ensure that the sub-tenant is complying and rent reviews and lease renewals dealt with as appropriate.

Where a sub-letting is of a floor or part floor in a building the general accepted practice is that the Department as landlord will provide: services to common parts; heating/air conditioning and plant maintenance; repair and decoration to the exterior and the common parts. The sub-tenants provide their own services such as cleaning, internal decoration and security to their own space. They will also pay their own utility costs either by their own direct supply or a separately metered share of the supply to the building (IR terms).

Where the sub-letting is of a whole building the accepted practice is that the sub-tenant carries out repairs and decoration to the whole building and provides all its services (FRI terms).

Costs of providing services to a sub-tenant are normally recovered by way of a service charge.

The benefit of having sub-lets is that they help to share the costs of running under-used premises.

If there is an intention to re-occupy sub-let space in the future sub-leases should be structured with the expiry to coincide with the date anticipated to re-occupy or with break clauses to permit flexibility where there is some uncertainty.

What should you do?

Instruct property advisers to act on behalf of the Department in managing sub-lets.
Where a sub-letting is of part of premises the Department, as landlord, may be expected to provide services to the sub-tenant as a condition of the sub-lease. The costs of such service are recovered from the sub-tenant. Efforts should be made to enable sub-tenants to be separately metered.

The services commonly expected to be provided by the landlord and included with the lease of the sub-letting may include:

- repair to the structure, the exterior and common parts;
- decoration to the exterior and common parts, including staircases, lobbies, main reception and common corridors;
- repairs and maintenance to plant and machinery used in common with the building including statutory inspections;
- heating/air conditioning to all areas and hot water to toilets;
- cleaning and security to common parts;
- window cleaning.

You should maintain a planned maintenance programme to prevent the accumulation of major work and reduce the probability of large unexpected costs. The cost of insurance is normally receivable from sub-tenants as well.

The sub-tenants will normally be expected to provide their own cleaning and security and will be expected to carry out internal decoration in accordance with their lease. The sub-lease will normally define all the services to be provided and the standards expected. Any action by a sub-tenant should comply with the spirit and intent of the Greening Government Initiative.

Where the Department is already occupying the premises which include the sub-letting, the services to the sub-letting can be provided from the existing services. Where the Department is not in occupation, arrangements will need to be made for providing these services, usually through a property adviser, who will advise on the services to be provided to the sub-tenant.
What should you do?

1. Consult property/legal advisers to ensure that you understand the terms of the lease dealing with the provision of services to sub-tenants and ensure that arrangements are made for providing the contractual services.

2. Endeavour to ensure that sub-tenants actively support the Government's environmental objectives.

3. Instruct property advisers to liaise with the sub-tenants in respect of disputes over services and the apportionment of costs of services.

4. Instruct property advisers to provide and manage the services where the Department does not occupy the premises subject to the sub-let.

5. If in doubt about the services to be provided, request an interpretation from a property adviser/legal adviser.
COLLECTING RENT AND SERVICE CHARGE

Rent

Rent payable under sub-lettings must be defined in the sub-lease and is normally payable quarterly in advance. Modern leases provide for the payment of interest if the sub-tenant does not pay the rent, whether demanded or not, within a specified period, normally 7 to 21 days. Accounting systems need to be set up to ensure that payments are recorded, arrears noted and dealt with and interest charged as appropriate. Where sub-tenants are consistently in arrears action should be taken on the advice of the property advisers and legal advisers. Accumulated arrears become increasingly difficult to collect and the law places strict time limits on pursuing further signatories to a lease to cover the debt. Regard should also be had to changes occurring as rent reviews and lease renewals take place.

Service Charge

Service charges are normally provided for in sub-leases as a way of reclaiming expenses incurred by the landlords. They are based on a relevant proportion of the total cost of services shared by occupiers of the building. The percentage of the cost is commonly based upon the apportioned floor area. However, where practical separate meters should be installed so that changes reflect actual consumption and costs incurred by the sub-tenant.

Most leases provide for a quarterly, on-account payment based upon an estimate of the services likely to be provided during the year. At the end of the year a reconciliation is calculated to compare actual costs with the amount paid on-account. An invoice is then produced to request the additional amount if the cost runs over the on-account payment or a credit note is issued or reimbursement made if the costs undershoot.
What should you do?

1. Set up accounting systems to recover rents in accordance with the terms of the lease.

2. Monitor when rents change such as at rent reviews or lease renewals and vary the invoicing.

3. Monitor arrears, recover interest and take advice or action if arrears continue.

4. Assess service charges arising from costs incurred in providing services to sub-tenants based on their actual consumption where practical.

5. Monitor costs throughout the year, apportion amounts and provide reconciliation accounts.
MGT 3.3

COMPLIANCE WITH SUB-LEASE OBLIGATIONS

An important aspect of management of sub-lets is ensuring that sub-tenants comply with the obligations in the sub-lease. The obligations which need to be monitored carefully include:

a) to pay rent;

b) to pay service charge;

c) to carry out repair and decoration within specified time limits;

d) to request consent for alterations;

e) to request consent for changes of use;

f) to request consent for sub-letting or assignation;

g) to comply with Government environmental objectives.

Items a) & b)

Accounting procedures need to be in place to track payments made by sub-tenants. Consistent non-payment cannot be permitted and action should be taken to recover arrears through legal advisers. In extreme cases action can be taken through the Courts, normally to recover possession of the space.

Item c)

Time limits for carrying out decoration to the premises in 3 year cycles for external work and 5 years for internal are usual. The sub-tenant will also normally be required to keep the premises in good repair internally or externally or both. Regular inspection should be carried out to ensure that the sub-tenant is complying. Where sub-tenants fall behind in such works they should be reminded of their obligations and in extreme cases a legal adviser should be appointed to advise upon the service of repair notices in accordance with the terms of the lease. It is important to limit the Department's exposure to potential dilapidations claims by ensuring that sub-tenants comply with repairing covenants.
Items d), e) & f)

Modern leases normally require that tenants should initially request the consent of the landlord for alterations, change of use and assignment and sub-letting. As such matters can be critical to the management of the space and the future use of the premises it is vital that proper consideration be given to such issues and advice is taken from property and legal advisers. It will also normally be necessary to request the consent of the Department's superior landlords to the changes proposed by the sub-tenant. Beware of extensive alteration and fitting out carried out by the sub-tenant. Departments should consider the sub-tenant's ability to re-instate at the end of the lease term.

What should you do?

1. Ensure that monitoring procedures are in place either internally or by a property adviser and take action and consult legal advisers where sub-tenants are consistently in arrears on rent and service charges.

2. Where alterations, change of use, or assignment or sub-letting are requested by the sub-tenant take the advice of property advisers and/or legal advisers who will check whether the superior landlord's consent is required.
LEASE EVENTS

Tracking procedures should be in place for identifying critical dates in respect of rent reviews, lease renewals and breaks. Action should be taken in good time to trigger these lease events by service of notices. Such notices should be served by property advisers and/or legal advisers. The procedures for triggering and carrying out rent reviews will normally be outlined in the sub-lease. These should be carefully followed.

Lease break options are defined in the lease and specific notice periods will be referred to. The successful operation of break options is often very technical and advice must be taken from legal advisers well in advance.

If a lease renewal to the existing tenant is proposed, advice should be taken from property advisers and/or legal advisers well in advance. Notices to terminate the tenancy will then need to be served to protect the Department’s position despite the fact that a renewal is proposed. In certain circumstances, eg where the passing rent is well above the market rent, it may be beneficial to delay service of notices but this must be subject to the advice of property/legal advisers.

Following the operation of provisions in respect of rent reviews/breaks and lease expiries and renewals, property advisers should be instructed in the normal way to act on behalf of the Department in negotiation.

Failure to trigger a rent review notice and/or failure to comply with the subsequent rent review mechanism can result in the Department losing the ability to recover an increase in rent.

Failure to serve proper notices in respect of breaks and lease expiries within required time limits and in the correct format can result in the Department losing the ability to operate this requirement and forfeiting its lease on the property.

What should you do?

1. Track all lease events in respect of sub-leases.
2. Bring forward consideration of rent reviews, breaks and lease expiries/renewals well in advance of the notice date.
3. Instruct property advisers and/or legal advisers to advise upon the action to be taken.
4. Instruct property advisers and/or legal advisers to act in the service of notices and subsequent responses.
MGT 3.5 **INSURANCE**

It would be normally be expected that the terms agreed with a commercial sub-tenant would include the payment of insurance premiums, because as a general principle tenants should not be allowed to benefit from the Government carrying its own risk. If the tenant causes ‘damage’ which would have been insurable, then the tenant is liable. If commercial insurance is not affected, it may subsequently transpire that the tenant does not have the ability to pay and the result could be that the Government Department is left with financial liability.

The following possible scenarios seek to illustrate how the insurance issue might be dealt with:

- Where an entire building is sub-let to a single tenant, the preferred approach is for the Department to insure the building and to recover the whole of the premium from the tenant. This would accord with normal commercial practice. **It is not usual to allow the tenant to insure and pay the premium because he may default on the arrangements and leave the Department exposed to loss.**

- Where a significant part of a building is to be sub-let – say over 20%, it may be appropriate for the Department to effect insurance and make the tenant responsible for the premium charged. The tenant is likely to object if he carries the premium for the whole building while only occupying 20%. The Department may be able to agree, with the insurance company, a lesser sum assured on the basis that the Department carries its own risk on its own part of the building.

- Where only a small part of a building is sub-let – say less than 20%, it may be more reasonable for the Department to charge the tenant a notional insurance premium in return for continuing to carry the risks which would normally be covered by an insurance policy. This method has been used by several Government Departments.

- Where the letting is of one or two rooms, for example, the usual method of dealing with this is to charge the tenant a rent which is ‘inclusive of the risks’ which are carried by the Department. In practice, this rent may also be inclusive of the cost of other services provided and might well be reviewed at more frequent intervals than the rent alone.
It should be remembered that the question of insurance is only one small part of the overall heads of terms which need to be agreed when sub-letting premises. This issue should not be allowed to dominate negotiations to the detriment of more important objectives, i.e. the disposal of the liability for surplus space.

**What should you do?**

1. Instruct property advisers to include advice on dealing with insurance aspects as part of their recommendations.

2. Refer to CAU Information Note 2/98 on “Insurance of Government Buildings: Lettings to Commercial Tenants”.

ACQ 2.6
Paragraphs 4.0 - 4.8 reserved
SHARING OF PREMISES WITH CONTRACTORS

The occupation or sharing of Government accommodation by third party contractors, as a result of market testing/contractorisation initiatives, raises a number of issues:

i  the legal authority to hold property for that purpose and the power of Departments to acquire property for that purpose;

ii  for leased property, the landlord’s consent will almost always be needed before a contractor is permitted to take up occupation;

iii  for leased property, the insurer’s consent may be needed as a matter of prudence; and

iv  the terms on which the contractor will occupy Departmental property.

Item i)

Legal advice suggests that the Commissioner of Works Act 1852 provides authority for the Government to acquire land/buildings for, or permit occupation by, contractors who provide services for or on behalf of a Department.

Item ii)

Where the Department holds property on a lease, it is likely that landlords consent will be required to the grant of any form of lease, tenancy or licence and the terms and conditions contained therein. Some leases will contain a covenant against sharing ‘possession’ or ‘occupation’ of the accommodation.

Item iii)

Where the Department holds property on a lease from private landlords who insure their buildings with external insurance companies, it may be prudent to notify or seek consent, where necessary, from the insurance company in the event of a contractor occupying part of the building.
Item iv)

The following points should be considered when deciding terms of occupation:

- the length of term should not normally be longer than the length of the contract;
- the length of the proposed term should be considered in relation to Departments’ estate strategy for the property and any estate rationalisation proposals put forward by PACE; and
- provisions enabling the landlord to terminate or re-locate the lease during the term.

Where a Government body is privatised, the property issues are very similar to those involved in the occupation of premises by third party contractors. Under the terms of the Departmental Estate Occupancy Agreement (DEOA) paragraph 3.16 procedures are set out for occupiers to consult in jointly occupied buildings, so that they can agree what form of occupation, if any, is to be offered to the privatised body.

**What should you do?**

1. Fully consider the property implications of any market testing exercise at the earliest stage.
2. Fully consider and document the accommodation arrangements for contractors before they are allowed to take up occupation.
3. Seek the advice of property and/or legal advisers where necessary.
4. Where a Department occupies premises under a MOTO discuss any action to be taken with the Holder as soon as possible.
5. Notify PACE, under the terms of CECA, of any intention to grant a lease to a third party contractor.
6. See CAU Information Note 16/97, Sharing Occupations of Premises by Third Party Contractors, for more detailed advice.
RATES

RATION OF NON DOMESTIC PROPERTY

Rates are a tax on the occupation of property and have a history going back some 400 years in the UK. In the case of non-domestic properties, rental valuations are used as the basis on which to assess the rateable value of properties and a rate in the pound is then applied to produce the rate demands.

Since rental values change over time the rateable value also needs to be reassessed at regular intervals. The Local Government Finance Act 1988 was the enabling legislation for the 1990 Rating Revaluation. There has since been a revaluation in 1995 and there will be a further revaluation in 2000.

Current practice is to adopt prevailing rental values from two years prior to a revaluation to determine the properties’ rateable value. As a consequence the valuation date for the 1995 Rating Revaluation is 1 April 1993 and for the 2000 Rating Revaluation will be 1 April 1998.

The Uniform Business Rate and Rates Collection

The 1990 Rating Revaluation saw the introduction of the nationwide Uniform Business Rate (UBR). Up to then rates had been set and levied locally by the local authority. Local authorities are still responsible for levying and collecting the national rate from every business appearing on the Valuation Roll, but the amount collected is determined by Central Government through the UBR and transitional relief/phasing provisions. The latter were introduced for the 1990 and 1995 Rating Revaluations to avoid volatility in rates liabilities between revaluations. As an example, in London, these arrangements typically protected office occupiers from large rate increases after the 1990 Rating Revaluation and limited potential savings post 1995; the valuation date in 1993 being a low point in the London office market with resultant drops in rateable values.

Certain ratepayers such as the former public utilities appear on the Central Rating List and collection is carried out by the DETR. The 2000 Rating Revaluation will see the abolition of the Central Rating List and all property formerly on the Central Rating List will be entered on the Valuation Roll.
All rate income collected by local authorities and the DETR is paid into a national rating pool from where it is redistributed to local authorities in proportion to their population. Central Government also makes a contribution to the pool in respect of Crown Properties which are currently exempt from rates. Crown occupiers currently make a Contribution In Lieu Of Rates (CILO R). The pool evens out significant differences in the distribution of rateable property across the country and ensures that businesses and local authorities are protected from the consequences of the wide disparity in local rate bases.

The Appeal Procedures

Ratepayers have the right to appeal their rating assessment. The ratepayer serves a proposal on the Assessor who maintains the Valuation Roll. The proposal needs to identify the rating assessment and set out the grounds of the appeal. If the ratepayer and Assessor are unable to resolve the matter through negotiation, then the appeal is heard by the Valuation Appeal Committee with either party having the right to appeal the Valuation Committee decision to the Lands Valuation Appeal Court and thereafter, the Court of Session. (See below for Crown Occupier appeals.)
CROWN PROPERTIES

The Current System

Until 31 March 2000 Crown occupiers will continue to pay CILOR which is based on a rateable value set by the Valuation Office Agency (VOA). This rateable value is assessed in the same way as for properties that are not Crown occupied. The amount payable is calculated using the UBR multiplier and reflecting any transitional arrangements, just as for any other occupier. However, unlike other occupiers, the Crown is billed by the Crown Property Unit of the VOA, not the local authority and although Crown occupiers can seek a review of their rateable value there have been no formal rights of appeal.

The New System

The Local Government and Rating Act 1997 provided for the removal of Crown exemption from non-domestic rates from a date to be appointed by order of the relevant Secretary of State. On 15 June 1998, Ministers announced to Parliament that this power would be invoked to operate from 1 April 2000 to coincide with the next revaluation and will apply to England, Scotland and Wales.

The new system means that Crown occupiers will become liable for rates on their property, just like any other business occupier. The new system will bring the following important changes.

Local authority billing: From 1 April 2000 Crown occupiers’ bills will no longer be calculated and issued by the VOA’s Crown Property Unit. From 1 April 2000 the local authority will issue bills and collect the rates. Bills will be received from individual local authorities within whose localities Departments are ‘Rateable Occupiers’. The Crown will be treated in exactly the same way as any other ratepayer.
Rights of appeal: From 1 April 2000 the Crown Occupier will have the same statutory rights as other ratepayers. Appeal regulations are currently being redrafted for introduction with effect from 1 April 2000. Apart from a limited number of ‘sensitive’ properties which will continue to be assessed by the Crown Property Unit, the majority of Crown occupations will be assessed by the local Assessor and any queries or appeals should be addressed to him/her. HM Treasury Guidance issued in TOA letter on 1 October 1998 hoped that it would not usually be necessary for Departments to exercise formal appeal rights, and that advisers would only be engaged where fully justified to do so. It is hoped that in most cases Crown occupiers will discuss any queries with the Assessor before making an appeal, having a view to resolving any differences without the need to resort to formal procedures. PACE can advise on how to resolve rating queries and on the use of professional advisers.

Revaluation: The 2000 Rating Revaluation means that all rateable values will change. The new values will be based on the rental value of the property occupied as at 1 April 1998. Currently rateable values are based on 1993 levels of value.

New rules for Crown occupiers: New rules have been created in respect of the ‘Unit of Assessment’ when applied to Crown occupations. This will mean that in certain instances there will be changes to the way in which multi-occupied and part vacant properties are described and valued. These new rules also determine which Department will be the ‘Rateable Occupier’ and consequently who will receive and be liable to pay the bill and who will be able to make a formal appeal.

The ‘Rateable Occupier’ in Jointly Occupied Buildings

The ‘Rateable Occupier’ is the occupier who is liable to pay the rates for the property that is shown in the Valuation Roll. This is usually the actual occupier.

Where several Departments occupy a single property, because the Crown is indivisible, special rules were included in the Local Government and Rating Act 1997 to determine how their property should be assessed and which Department would be the ‘Rateable Occupier’. Where it accords with existing Rating Law and practice, multiple Crown occupations will be treated as one and only a single entry will appear in the List. The single entry relates to a single ‘Unit of Assessment’. The Act specifies that in these cases the ‘Rateable Occupier’ will be ‘such one of the occupiers as appears to occupy the largest part of the property’. This will not necessarily be the ‘Holder’ (the owner of the feuhold or leasehold interest).
This could have implications for Departments that do not presently handle CILOR bills on behalf of other Departments. Although many Crown properties are already assessed collectively there may be instances where new arrangements will need to be made to allow for reimbursement of the new ratepayer. The definition of Rateable Occupier also carries implications concerning who will have statutory rights of appeal. The ratepayer will have the right to make appeals and should be the point of contact for discussions with the Assessor or the local authority. Arrangements should be put in place to enable the views of other occupiers to be fairly represented.

Rating Agreements

Where several Crown occupiers are assessed within a single Unit of Assessment it will usually be possible to accommodate the reimbursement and representation arrangements within the Memoranda of Terms of Occupation (MOTO). The Departmental Estate Occupancy Agreement (DEOA) is being revised and will contain standard clauses to allow for the new rules.

In rare cases where several Holders (owners of leasehold interests from commercial landlords) have their property amalgamated into one Unit of Assessment it will be necessary to ensure that a Rating Agreement is in place which allows for reimbursement of the Ratepayer and fair representation for all the occupiers.

Vacant Property

CILOR and Rates can be charged on vacant property. However, rate relief is available from local authorities. Where a part of a jointly Crown occupied property becomes vacant it could be beneficial to seek a separate rateable value for the vacant part. This is possible because the new rules only apply to occupied property. Advice should be sought from the local authority or the Assessor.

Timing

Under the new system it will be vital for bills to be paid on time in order to avoid initiating the local authority's unpaid Rates recovery procedures.
Timing is also important when appeals are made since the date of the appeal determines the date as at which the property is re-assessed, and the circumstances of the property on that date will be taken into account in the valuation. Appeals can not be made retrospectively, although alterations can be backdated in some circumstances.

**What should you do?**

1. In jointly occupied property occupiers should examine their Valuation Roll assessment and consider whether a new Rating Agreement is required.

2. Discuss queries about CIOR with the Crown Property Unit.

3. Consider taking advice as to liabilities after 1 April 2000 when the 2000 Revaluation transitional arrangements are announced in Autumn 1999.

4. Consult PACE if in doubt regarding rating, appeals and the use of professional rating advisers.

5. Where parts of accommodation are unoccupied, empty rate relief may be available. The local authority should be notified and advice obtained.
MGT 6.0  

TOWN PLANNING

MGT 6.1  

GENERAL

The statutory requirements for dealing with town planning matters are contained in the Town and Country Planning (Scotland) Act 1997 along with the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, the Planning (Hazardous Substances) (Scotland) Act 1997 and the Planning (Consequential Provisions) (Scotland) Act 1997. In addition, the Scottish Executive Development Department produces Regulations and Orders supplementary to the above-mentioned Acts.

In particular, Part XII (sections -251) of the Town and Country Planning (Scotland) Act 1997 details the application of the Act to Crown land. In general, the 1997 Act proceeds on the assumption that the Crown is not subject to any requirement of planning permission for development carried out by it. Planning control does extend to cases where there is a privately owned interest upon the land or where it is proposed to dispose of land and planning permission is desired in anticipation of that disposal. As such the Crown is immune from planning control, particularly in respect of any form of enforcement action.

The Government has indicated that it intends to remove Crown immunity, save for circumstances involving national security. No date has yet been set for removal of Crown immunity. Nonetheless, town planning coverage has been comprehensively dealt with in anticipation of removal of immunity. Where a Government Department wishes to undertake development it must do so under Scottish Office Circular 21/84 procedure ("Crown Land and Crown Development").

All Crown bodies have agreed to adhere to a voluntary arrangement whereby notice of any proposed development is served on the planning authority and treated as though it were an application for permission. If the Crown body and the planning authority fail to reach agreement, the proposal is referred to the Minister for the Environment and Transport to decide whether planning clearance can be given.
MGT 6.1.1 Crown Development

The Town and Country Planning (Scotland) Act 1997, with minor exceptions, does not affect the Crown. The Crown for these purposes includes Her Majesty in right of the Crown and Crown land includes land of any Government Department. The Crown does not therefore need planning permission for development for its own purposes. The minor exceptions include the indication of proposals for the use of Crown land on a development plan and the ‘listing’ of a building on Crown land. (‘Listing’ refers to the listing of buildings by Historic Scotland as being of special architectural or historic interest. Once ‘listed’ special consent is required before alterations or demolition can take place). Tenants and lessees of Crown land will require planning permission for development; they may be served with an Enforcement Notice; and may themselves serve a Purchase Notice.

Scottish Development Department Circular 21/84 provides advice on the management and disposal of Crown land. Where the Crown wishes to dispose of surplus land with the benefit of planning permission, the Crown is required to obtain planning consent through the normal planning process under the 1997 Act. Where development is proposed by Government Departments the procedure is to consult the local planning authority on the proposals.

Development by the Crown does not need planning permission, however it must follow the Circular 21/84 procedure which is analogous to the procedure to obtain planning consent under the 1997 Act. The local planning authority may have no objections to the proposals but where there are objections that cannot be resolved, a non-statutory public inquiry will be held to consider the objections.

Government Departments will use the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 as a guide to the kinds of development which they may carry out without consultation, and apply to their own development, mutatis mutandis (with the necessary changes), the permissions granted by the Order to private bodies, local authorities and statutory undertakers. Additionally, Government Departments should notify local planning authorities of proposals which will be of special concern, such as those in Conservation Areas or where there could be a significant planning impact.

None of the consultations can fully apply to proposals involving national security.
What should you do?

1. Early discussion with the local planning authority is generally advisable prior to the formal consultation procedure under Circular 21/84. The method of consultation is detailed in Circular 21/84 and this must be followed providing the local planning authority with the necessary information.

2. On large or complicated proposals, property advisers with specialist knowledge should be instructed.
MGT 6.1.2 **Decision Makers and Authorities**

**Local Planning Authorities**

The Town and Country Planning (Scotland) Act 1997 confers a variety of powers and functions on ‘local planning authorities’. 31 Unitary authorities were created in the local government re-organisation of 1996. Regional Councils, the former upper tier, were abolished at that time. Each unitary authority has responsibility for development control and preparation of the local plan for its area.

**The Minister for the Environment and Transport**

The Minister for the Environment and Transport has a series of wide ranging supervisory functions under the 1997 Act. The Minister is empowered to call in for decision, proposed local plans and approves structure plans. The Minister also deals with appeals on all adverse development control decisions and enforcement notices. The Minister’s confirmation is required for orders revoking or modifying planning permission, requiring the discontinuance of land and for compulsory purchase orders.

The Minister has powers to deliberate over individual planning applications by using the ‘call-in’ procedure, which effectively takes away the decision-making powers from local planning authorities.

**Other Government Ministers**

Other Government Ministers become involved in the planning system as consultees on plans and development control decisions, and the Minister of Agriculture, Fisheries and Food has special status in this respect.
MGT 6.1.3  National Planning Policy  

The Scottish Executive Development Department from time to time issues written public statements in the form of National Planning Policy Guidelines (NPPGs) Circulars and Planning Advice Notes (PANs), which are material policy considerations in planning decisions. That is to say, that where Departments wish to carry out development they must have regard to the content of such documents.

The current NPPGs and PANs are listed below:

NPPG 1  The Planning System  Feb 1994  
NPPG 2  Business and Industry  Sept 1993  
NPPG 3  Land for Housing  Nov 1996  
NPPG 4  Land for Mineral Working  April 1994  
NPPG 5  Archaeology and Planning  Jan 1994  
NPPG 6  Renewable Energy  Aug 1994  
NPPG 7  Planning and Flooding  Sept 1995  
NPPG 8  Town Centres and Retailing  Oct 1998  
NPPG 9  The provision of Roadside Facilities on Motorways and Other trunk roads in Scotland  March 1996  
NPPG 10  Planning and Waste Management  March 1996  
NPPG 11  Sport, Physical Recreation and Open Space  June 1996  
NPPG 12  Skiing Development  June 1997  
NPPG 13  Coastal Planning  Aug 1997  
NPPG 14  Natural Heritage  Jan 1999  
NPPG 15  Rural Development  Feb 1999  
NPPG 16  Opencast Coal and Related Minerals  March 1999  
NPPG 17  Transport and Planning  April 1999  
NPPG 18  Planning and the Historic Environment  April 1999  

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**ESTATE MANAGEMENT**

**GENERAL**

**TOWN PLANNING**
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A complete list of current Circulars can be obtained by telephoning the Scottish Executive Development Department on 0131 244 7066 or on the internet [http://www.scotland.gov.uk/planning/](http://www.scotland.gov.uk/planning/)

**What should you do?**

Instruct property advisers to monitor and advise upon consultation draft policy or guidance notes if subject to the consultation process.
MGT 6.1.4 **Sustainability**

The most widely used definition of sustainable development is ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. This definition was first adopted by the Bruntland Commission and has, since the Earth Summit of 1992, been accepted by successive UK Governments. The Government has fully endorsed the concept and principles of sustainable development and has made this explicit in several NPPGs, Circulars and PANs.

The Government published a UK strategy for sustainable development in 1994 and has also published a guide for local planning authorities entitled “Planning for Sustainable Development: Towards Better Practice”. The latter aims to assist the planning of new housing and development in a way that meets the Government's objectives for sustainable development, by providing planners with good practice guidance on how to focus development within urban areas and increase housing densities and the amount of development on previously used land.

**NPPG** 1 The Planning System, issued in 1994, stresses the need, when contemplating development, to recycle previously developed land (the so-called ‘brownfield’ sites), as opposed to using ‘greenfield’ sites. Similarly, **NPPG 17** on Transport and Planning (1999) seeks the integration of efficient transport systems with land use planning by reducing the need for motorised journeys, encouraging alternative means of travel and reducing reliance on the private motor car.

**When considering property strategies and general estate management matters, Government Departments** should embrace the principles of sustainable development and comply with Government policy.

**A Department** of the Environment, Transport and the Regions publication “Towards more sustainable construction – Green Guide for Managers on the Government Estate” gives specific advice and guidance on most aspects relating to estate management.
Green Belt

Planning policy for Green Belts is set out in Circular 24/1985 Development in the Countryside and Green Belts. There is no separate NPPG or PAN devoted to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl and keep land permanently open. This ensures that the countryside is protected and maintained primarily for agricultural and forestry use. The five main purposes for including land in a Green Belt are as follows:

- to check the unrestricted sprawl of large built up areas;
- to prevent neighbouring towns from merging into one another;
- to assist in safeguarding the countryside from encroachment;
- to protect the setting and special character of historic towns; and
- to assist in urban regeneration, by encouraging the re-cycling of derelict urban land.

The reasons for including land in Green Belts are of paramount importance to their continued protection, and should take precedence over the land use objectives. The importance feature of Green Belts is their permanence. Their protection must be maintained as far into the future as can be envisaged.

Green Belts are established through development plans. Many detailed Green Belt boundaries have yet to be defined. Once the general extent of the Green Belt has been approved, it should only be altered in exceptional circumstances.

Within a Green Belt there is a general presumption against inappropriate development which is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. A substantial weight, therefore, is given to Green Belt designation in considering any planning application or appeal.

Surplus property may lie within areas of sensitive planning control such as the Green Belt or a Conservation Area and/or the property may be statutorily listed. In any of these circumstances development potential may be significantly affected.

What should you do?

Instruct property advisers to advise when making planning applications in a Green Belt.
MGT 6.1.6  
**Regional Planning Policy**

There is no tier of regional plans or regional guidance in Scotland. However, the Consultation Paper “Land use Planning under a Scottish Parliament” (1999) sought views on whether sub-national planning guidance should replace structure plans. The outcome of this consultation is not yet known.
**DEVELOPMENT PLANS**

In exercising its development control functions, the local planning authority must have regard to the contents of the ‘development plan’ (Section 25 of the 1997 Act) and the determination should be made in accordance with the development plan, unless material considerations indicate otherwise.

The development plan is the document which describes the planning policies for an area and it usually comprises policies and supporting text, together with a map of land use proposals.

Planning and development control are inter-related with planning essentially allocating land uses and development control detailing the day to day implementation of the planning task. Development plans come in the form of structure plans and local plans. All statutory development plans are required to go through extensive public consultation and normally through a public inquiry. Planning authorities may from time to time publish non-statutory documents to supplement development plans, such as planning or development briefs.
MGT 6.2.1

**Structure Plans**

A ‘Structure Plan’ contains policies and statements on a strategic level, normally covering an entire unitary authority. Structure plans are not precise in terms of land use allocation, since such matters are addressed in Local Plans. All structure plans are required to be submitted to The Minister for the Environment and Transport before the plan can take effect, and the Minister can impose modifications contrary to the wishes of the authority. Responsibility for preparation of structure plans has been transferred to the new unitary authorities and 17 structure plan areas have been designated. There are six structure plan areas which cover more than one planning authority and in these areas, the authorities have to jointly prepare a structure plan.

**Structure Plan Area**

Shetland Islands

Orkney Island

Western Isles

Highland

Moray

Aberdeen and Aberdeenshire (2 authorities)

Dundee and Angus (2 authorities)

Perthshire and Kinross

Stirling and Clackmannan (2 authorities)

Falkirk

Fife

Edinburgh and Lothians (4 authorities)

Borders

Dumfries and Galloway

Ayrshire (2 authorities)

Glasgow and Clyde Valley (8 authorities)

Argyll and Bute
Section 25 of the 1997 Planning Act sets out the status of development plans and advises that ‘where, in making any determination under the Planning Act, regard is to be had to the Development Plan, the determination shall be made in accordance with the Plan unless material considerations indicate otherwise’. This is relevant to any Government Department which is preparing an application or consultation for development, insofar as the proposal should not normally be contrary to the provisions of the development plan.

The planning authority may at any time prepare proposals for alterations to the structure plan for their area or for its replacement. A public consultation exercise must be undertaken before the planning authority places the finalised plan on deposit. There is a six week period to lodge objections with the Minister who can then hold an Examination in Public before approving, modifying or rejecting the plan.

**Failure to submit representations or objections within the defined time period is likely to render such submissions null and void.**

**What should you do?**

1. Create and maintain a record of all properties on an authority by authority basis.

2. Instruct property advisers to monitor the status of structure plans and to submit representations and/or objections on your behalf. **N.B. Time is of the essence in submitting representations.**
Local Plans

The objective of the structure plan is to provide a broad strategic statement of planning policies for the area. The ‘Local Plan’ implements the detail at a district or more detailed level. A local plan consists of a written statement formulated in such detail as the local planning authority considers appropriate, for the development or other use of land in their area. The plan should include such measures as the local planning authority thinks fit for the improvement of the physical environment and the management of traffic.

The local plan must include a map showing land use proposals and such diagrams, illustrations or other descriptive matters as is deemed appropriate. Most local plans go through both consultation and deposit draft stages of public participation before being examined at a local inquiry before a Reporter appointed by the planning authority from a list prepared by the Minister. Following this, the local planning authority are then in a position to formally accept the plan for that area. The local planning authority must give adequate publicity to the proposals to be contained in the local plan to enable persons who may be expected to have an interest to make representations. The local planning authority is expected to take those representations into account.

Failure to submit representations or objections within the defined period of public consultation would normally render such submissions as null and void.

What should you do?

1. Ensure property records identify districts.

2. Instruct property advisers to maintain a list of all local plans and their status where necessary and instruct them to submit representations/objections within the prescribed time period, if appropriate.
MGT 6.2.3  Planning Briefs

Planning briefs are normally prepared by local planning authorities in conjunction with landowners, developers and local interested parties, including members of the public. Such briefs are site specific and set out detailed planning policy relating to land use, design and development standards. Planning briefs would normally only be prepared for important strategic sites or large scale sites within a district. They are intended to explain the proposals for a site in greater detail than would be covered in a local plan.

If the local planning authority advise that they intend to prepare a brief which affects your land, then negotiations should be undertaken to ensure your interests are fully represented. Normally, the local planning authority would set out deadlines for submitting representations.

Failure to respond within the set time period would lead to a missed opportunity to bring forward development opportunities or to object to adverse development proposals put forward which may affect your property interests.

What should you do?

If notified by the local planning authority that they intend to produce a planning brief, instruct property advisers to submit representations and negotiate on your behalf and to respond within the prescribed time period.
THE MEANING OF ‘DEVELOPMENT’

MGT 6.3

General

The control of ‘development’ in Scotland is achieved through the requirement for planning permission under the 1997 Act. In general terms ‘development’ requires planning permission unless it is excluded, or expressly permitted.

An understanding of the meaning of ‘Development’ is therefore crucial to an appreciation of the workings of the 1997 Act. ‘Development’ is defined in Section 28 of the 1997 Act as ‘the carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land’.

The distinction between ‘operational development’ on the one hand and ‘material changes of use’ on the other is fundamental to the Act. ‘Operational development’ would include, inter alia, the demolition of buildings, rebuilding and structural alterations/additions to buildings and construction of roads. A ‘material change of use’ is, however, not defined in the Act. Whether a change of use is material is a matter of fact and degree in each case. However, it is clear from case law that in broad terms, a material change of use will involve a new use substantially different from the old.

There are of course exceptions to the above broad principles. For the purposes of the Act the use of land for the purposes of agriculture and forestry is specifically excluded from control under the Act, as are many of the maintenance operations of statutory undertakers and internal alterations to a building.

In order to minimise the number of planning applications required for development, the Act also excludes from the definition of ‘development’ changes of use where both the existing and proposed use fall within the same class in an order made by the Minister. The relevant current order is the 1997 Use Classes Order.

In a further attempt to minimise the level of regulation, certain minor building operations and changes of use, whilst still falling within the definition of ‘development’ are deemed to have consent. The types of development concerned are set out in the Permitted Development Order (PDO) 1992.
MGT 6.3.2 Use Classes Order 1987

A ‘material’ change of use constitutes development which would normally require planning permission. The aim of the Town & Country Planning (Use Classes) (Scotland) Order 1997, however, is to reduce the number of planning applications required for less significant changes of use. It achieves this by designating groups of uses (Use Classes) within which a change does not require planning permission. There are 11 classes in the current order as follows:

Class 1 - Shops

a) the retail sale of goods other than hot food;
b) as a post office;
c) for the sale of tickets
d) as a travel agency
e) for the sale of cold food for consumption off the premises
f) for hairdressing;
g) for the direction of funerals;
h) for the display of goods for sale;
i) for the living out of domestic or personal goods or articles;
j) as a launderette or dry cleaners, or
k) for the reception of goods to be washed, cleaned or repaired.

Where the sale, display or service is principally to visiting members of the public.

Class 2 - financial, professional and other services

Use for the provision of:
a) financial services;
b) professional services; or
c) any other services (including use as a betting office)

which it is appropriate to provide in a shopping area and where the services are provided principally to visiting members of the public.
Class 3 - Food and Drink

Use for the sale of food and drink for consumption on the premises.

Class 4 - Business

a) as an office, other than a use within Class 2 (financial, professional and other services);

b) for research and development of products or processes;

c) for any industrial process

being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

Class 5 - General industrial

Use for the carrying on of an industrial process other than one falling within Class 4 (business).

Class 6 - Storage or distribution

Use for storage or as a distribution centre.

Class 7 - Hotels and hostels

Use as a hotel, boarding house, guest house, or hostel where no significant element of care is provided, other than premises licensed for the sale of alcoholic liquor to persons other than residents or to persons other that persons consuming meals on the premises and other than a use within Class 9 (houses).

Class 8 - Residential Institutions

Use:

a) for the provision of residential accommodation and care to people in need of care other than a use within Class 9 (houses);

b) as a hospital or nursing home;

c) as a residential school, college or training centre.
Class 9 - Houses

Use:

a) as a house, other than as a flat, whether or not as a sole or main residence, by:
   i) a single person or by people living together as a family, or
   ii) not more than five residents living together including a household where care is provided for residents;

b) as a bed and breakfast establishment or guesthouse (not in either case being carried out in a flat), where at any one time not more than two bedrooms are, or in the case of premises having less than four bedrooms one bedroom is, used for that purpose.

Class 10 - Non-residential institutions

Use, not including residential use:

a) as a creche, day nursery or day centre;

b) for the provision of education;

c) for the display of works of art (otherwise than for sale or hire);

d) as a museum;

e) as a public library or public reading room;

f) as a public hall or exhibition hall; or

g) for, or in connection with, public worship or religious instructions, or the social or recreational activities of a religious body.

Class 11 - Assembly and leisure

Use as a:

a) cinema;

b) concert hall;

c) bingo hall or casino;

d) dance hall or discotheque; or

e) swimming bath, skating rink, gymnasium or area of other indoor or outdoor sports or recreation, not involving motorised vehicles or firearms.
The Use Classes Order does **not** aim to provide a comprehensive classification of all uses of land. It does, however, bring together those uses which have a degree of commonality for the purposes of development control.

Uses which do not fit comfortably within any of the defined Use Classes in the Order are deemed to be ‘**sui generis**’. This means that planning permission is required for any change to and from such uses.

Government **Departments** generally occupy business premises under Class 4, the sub-classes of which are:

4 (a) offices; other than a use within Class 2 (financial, professional and other services);

4 (b) research and development;

4 (c) industrial processes which can be carried out in any residential area without detriment to amenity;

5 general industrial use other than (B1);

6 storage or distribution.

Policies in local plans and conditions attached to planning permissions may restrict **Departments** from changing from one Use Class (or indeed sub-class) to another.

**What should you do?**

Instruct property advisers if a change of use is envisaged.
MGT 6.3.3  **Permitted Development Order (PDO)**

The Town & Country Planning General (Permitted Development) (Scotland) Order 1992 defines various classes of minor development which are deemed to be ‘permitted development’ and do not therefore require planning permission.

**The Crown does not benefit from the provisions of the General Permitted Development Order.** However, Government Departments should use the GPDO as a guide to which types of Development should form the basis of consultations (under Scottish Office Circular 21/84) with the local planning authority.

The relaxation of control over minor development reduces the administrative burden of development control making it unnecessary to submit planning applications for minor development.

The GPDO also sets out the procedures for restoring more detailed development control powers in sensitive locations, such as Conservation Areas. This is achieved by the local authority making an ‘Article 4 Direction’ which takes away ‘permitted development rights’ and requires the submission of a planning application in the normal way.

**What should you do?**

Seek advice from property advisers with regard to possible exemptions from the requirement for Scottish Office Circular 21/84 consultation approval where minor development is envisaged.
MGT 6.4

DEVELOPMENT CONTROL

MGT 6.4.1

Planning Applications

If Departments wish to develop land for their own purposes a consultation under Scottish Office Circular 21/84 should be sent to the relevant local planning authority. Where such a consultation is necessary under Circular 21/84, it is important that the consultation is submitted in accordance with the guidance contained within the Circular and that the necessary information is supplied to the local planning authority.

Alternatively, where the Crown is seeking planning permission in anticipation of disposal, a planning application will be required under Section 248 of the 1997 Act. The 'appropriate authority' or any person authorised may apply for planning permission, (or other permissions such as listed building consent, conservation area consent or a determination under Section 150 of the 1997 Act).

Where a planning application is made under Section 248 the relevant interested parties must be notified of the application and appropriate certificates served together with supporting documents and plans. It is important to clearly specify the particulars of the proposed development for which consent is sought, since planning permission may be granted in accordance with any details or plans accompanying the application. If this is not done, the description (particularly of the proposed use) that is contained in the application form, may be the only form of words available for a Reporter or Court to consider in cases of dispute.

The local planning authority should make a determination within 8 weeks of the submission of the application. However, in practice this is rarely the case, save for minor developments.

An applicant for planning permission is required to sign a certificate declaring that they are the sole owner of the land subject to the planning application. If other parties have a legal interest, either leasehold (of seven years or more unexpired), or feuhold, they must be notified.

In certain instances it may be necessary to place adverts in a local newspaper or erect a Notice on the site which is the subject of the planning application.

Failure to submit the correct forms and notices will render the application invalid.

What should you do?

Instruct property advisers to advise on the form and content of a planning application.
Planning Permission

A local planning authority and/or The Minister for the Environment and Transport may grant planning permission unconditionally, or subject to conditions, or may refuse planning permission. A planning permission and any conditions attached to that permission ‘runs with’/enures for the benefit of the land, although in certain circumstances consent may be granted which is specifically personal to an individual or company ie no other party can benefit from the consent.

Planning permission is normally required for the carrying out of any development of land. This covers the carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land. ‘Development’ covers two distinct activities: the carrying out of certain operations and the making of a material change of use. Planning permission for a use of land will not authorise the erection of buildings. Planning permission may also be sought and granted for the retention of land or buildings or works, or the continuance of a use of land where these exist and are in breach of planning control.

Every planning permission is deemed granted subject to a condition that development must begin within five years of the grant. The local planning authority may grant, in appropriate cases, planning permission subject to a longer or shorter time limit.

Where outline planning permission is granted for building or other operations it will be granted subject to a condition that an application for approval of the reserved matters must be made within three years of the outline permission or two years from the final approval of the reserved matters, whichever is the later date.

Failure to implement a consent within five years of it being granted, in the case of a detailed permission, or failure to submit details for approval under reserved matters within three years of an outline, will result in the permission expiring.

What should you do?

1. Maintain records of planning consents.

2. Instruct property advisers to apply for and negotiate planning permissions and to submit details under conditions and reserved matters or renew outline consent.
Planning Conditions

Planning permission should be granted unless there are specific convincing reasons to the contrary which cannot be overcome by attaching reasonable planning conditions. The power to impose planning conditions is contained in Section 37 of the Town and Country Planning (Scotland) Act 1997. Conditions may be attached to the grant of a planning permission where permission might otherwise have been refused, or to enable a development to proceed in a satisfactory form. Local planning authorities do, however, need to state clearly and precisely the full reasons for the imposition of any planning conditions. Case law has established that such conditions must be:

- necessary;
- relevant to planning and the development permitted;
- reasonable;
- precise; and
- enforceable.

Time limits on planning permissions are conditions implied by statute. Normally permissions last for 5 years unless otherwise stated. A grant of outline permission is subject to two types of time limit. The first requires that an application must be made for the approval of reserved matters within 3 years from the grant of the permission. The second requires that within 5 years from the grant of permission (or 2 years from final approval of the last of the reserved matters), whichever is the longer, the development should be commenced.

The modification or removal of a planning condition can be sought by application to the local planning authority and if refused can be appealed to the Minister for his determination.

What should you do?

1. Check the relevant planning permission and note any conditions or time limits. If conditions are not adhered to then the development could be the subject of enforcement action.

2. Instruct property advisers to study the imposition of conditions. If conditions are invalid, then a planning application or an appeal can be used to remove or alter conditions.
Planning Agreements

Planning agreements or obligations may be imposed in addition to planning conditions. Local authorities have a general power to enter into such agreements in order to facilitate development, or to make or receive payments. Agreements can be made, inter alia, under the Town and Country Planning (Scotland) Act 1997 between a local planning authority and developers/landowners. These are usually made under Section 75 of the Act, for a number of purposes, including restricting or regulating the development or use of land.

The most common use of planning agreements is in connection with the grant of a planning permission where there are matters which cannot be dealt with adequately by way of a planning condition, e.g., the payment of a financial contribution. Where such an agreement is necessary, it will contain obligations to be fulfilled by the applicant/landowner/local planning authority. Such obligations should only be sought when they are necessary to the grant of the permission and relevant to the development to be permitted.

Unacceptable development should never be permitted because of unrelated benefits offered by the applicant, i.e., ‘planning gain’ nor should an acceptable development be refused permission simply because the applicant is unwilling or unable to offer such unrelated benefits. Agreements are executed by Deed and registered as a local land charge.

A Government Department can enter into a planning agreement under Section 246 of the 1997 Act. This is known as a Crown Planning Obligation and after registration in the Land Register for Scotland or the Register of Sasines, the agreement will be enforceable against any party acquiring title to the land.

For legal reasons a local planning authority is not able to enforce any obligations entered into by the Crown. However, such obligations are enforceable against any person with a private interest deriving from the Crown interest. If enforcement action is envisaged against any person with a private interest in Crown land, then the consent of the ‘appropriate authority’ must be obtained.

What should you do?

1. Monitor planning agreements so that obligations are complied with at trigger points.

2. Take advice from property and legal advisers when negotiating a planning agreement.
MGT 6.4.5  **Planning Appeals**

Applicants have a right to appeal to The Minister for the Environment and Transport against adverse planning decisions of local authorities.

The Crown can appeal under the SDD Circular 21/84 procedure for its own development, or under the main provisions of the Town and Country Planning (Scotland) Act 1997 in anticipation of disposal of land.

An appeal may be made not only against a refusal of planning permission or refusal to agree reserved matters, but also, for example, against conditions attached to a planning permission, a refusal of listed building or conservation area consent or an enforcement notice. The right of appeal is also available against failure to give a decision within the eight week statutory period in which planning authorities are required to make a decision.

An appeal to the Minister is in effect an appeal to the Scottish Reporters Unit and in all but a small percentage of cases the power to determine is transferred to that body.

There are three possible procedures which the Minister may use to deal with an appeal, namely: public inquiry, hearing or written representations, with the latter being the most commonly adopted for minor cases. The same procedures are adopted under Circular 21/84 appeals but they are non-statutory.

Appeals must be lodged within 6 months of the date of the decision document which is to be appealed (two months for advertisement appeals). Where enforcement notices are concerned, an appeal must be made before the date of compliance, which gives a minimum of 28 days.

**What should you do?**

Instruct property advisers to advise on appeals against adverse planning decisions.
Completion Notices

A Completion Notice may not be served on the Crown.

If a development authorised by planning permission is begun before the expiry date of the time limit, but the time limit has expired before the development has been completed, the local planning authority may serve a Completion Notice requiring the development to be completed within a stated period, normally not less than twelve months.

Failure to comply with a Completion Notice means that the planning permission ceases to be valid.

In practice Completion Notices are rarely used and when they are, it is usually only in extreme cases where serious problems have arisen through failure to complete a development.

What should you do?

1. Advise the originator that because of Crown immunity a Completion Notice cannot be served against the Department.

2. Instruct the property adviser to investigate the circumstances that gave rise to the issue of the Completion Notice and take appropriate action.
Demolition

Demolition of buildings falls within the definition of ‘development’. However, the Minister for the Environment issued a Direction in 1995, Town and Country Planning (Demolition which is not Development) (Scotland) Direction, attached to Circular 15/1995 which, in practice, excludes most forms of demolition from planning control, save for residential buildings (where demolition is categorised as ‘permitted development’) and those subject to other legislation eg listed buildings. A demolition warrant might be required under the Building (Scotland) Act 1959.

Demolition of residential buildings is not ‘permitted development’. Buildings under 50m³ can be demolished under the permitted development rights conferred by the Direction.

Before demolishing a residential building, an application must be made to the local planning authority for approval of the method of demolition and any proposed restoration of the site. Once so notified, the local planning authority has 28 days to consider whether they wish to give their prior approval to the method of demolition and restoration.

Demolition work must not be commenced before the local planning authority determines the application. If, however, the local planning authority fails to notify the applicant within 28 days, demolition may proceed.

Partial demolition of a building is generally regarded as ‘development’ by virtue of being a structural alteration of a building and is thus a ‘building operation’ for which planning permission would be required.

Buildings which are included in the statutory list of buildings kept by the Minister under the provisions of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 cannot be demolished without obtaining listed building consent. Buildings within conservation areas also need planning permission for demolition.

Opportunities to recycle or reclaim materials should be sought. Having regard to Landfill Tax, such action may reduce the cost of demolition.
What should you do?

1. Check with property advisers as to whether demolition would constitute development, hence require planning permission.

2. Refer to “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies” if the building is listed.

3. Check for the presence of any hazardous substances, such as asbestos, which would have an impact on the demolition process.
Certificate of Lawfulness of Existing Use or Development (CLEUD)

An application for a CLEUD is made to a local planning authority to determine whether any development or change of use that has taken place is lawful. Since the Crown is not subject to planning legislation, any use of land which it institutes is a lawful use and in general can be continued by a third party, unless otherwise agreed formally with a local planning authority. It follows that Departments cannot apply for a CLEUD.

If Crown immunity is removed, however, then Departments may need, in appropriate circumstances, to make an application for a CLEUD, in which case the following procedure should be adopted.

An application must specify the land and describe the use, operations or other matters for determination. The onus of proof is firmly on the applicant and a Certificate may be refused on the basis of ‘not proven on present evidence.’ A CLEUD should include details of:

- any existing use of buildings or other land;
- any operations which have been carried out in, on, over or under land;
- any other matter constituting a failure to comply with any condition or limitation subject to which planning permission is granted.

If the local planning authority is satisfied with the lawfulness of the development or change of use a Certificate should be issued. In all other cases they are required to refuse the application. A decision to refuse or failure to determine an application for a Certificate can be appealed to the Minister.

The grant of a Certificate generally gives immunity from enforcement action.

What should you do?

Check with property and legal advisers to consider the lawfulness of existing use or development.
**Certificate of Lawfulness of Proposed Use or Development (CLOPUD)**

A **CLOPUD** may be issued by a local planning authority to certify that any proposed use of buildings or land, or any other operations proposed to be carried out, in, on, over, or under land would be lawful if carried out without planning permission. This can be achieved by applying for a **CLOPUD** to the local planning authority in the standard form (available from the local planning authority).

Government Departments, in anticipation of disposal of land, may apply for a **CLOPUD**. It is not appropriate for Departments to apply for a **CLOPUD** in relation to their own proposed use or development of the land.

If, on application, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if carried out, then a Certificate will be issued. This is done on the basis of the local planning authority studying the background issues, as well as the scope of any permissions, and any enforcement notice or certificates relating to the site.

The Certificate may be granted for the whole or part of the land specified in the application, and for all or some of the uses specified.

Decisions are capable of being appealed to the Minister. The onus of proof is firmly on the applicant and a Certificate may be refused on the basis that it is ‘not proven on present evidence’.

**What should you do?**

Where appropriate, instruct property advisers to submit an application for a **CLOPUD** in respect of proposed use.
MGT 6.4.10  Purchase Notices

A Purchase Notice cannot be served by the Crown.

A Purchase Notice is the procedure adopted when in a landowner’s opinion land is left without any reasonably beneficial use by virtue of a planning decision. In certain circumstances where this is the case, the local planning authority are required to acquire the land and to pay compensation.

The server of the Purchase Notice must demonstrate that the land is ‘incapable of reasonably beneficial use’. The Minister would expect to see some evidence of an attempt to dispose of the land in the market before being satisfied that it has become incapable of reasonably beneficial use. A Purchase Notice must be served within 12 months of the planning decision on which the service of the notice is based.

The local planning authority may accept the Purchase Notice and proceed to acquire the land or they may reject the Purchase Notice in which case they must refer the Notice to the Minister. The Minister has a number of options available: to confirm the Notice (in whole or in part), to grant planning permission (the refusal of which gave rise to the Notice), or to direct that planning permission be granted for some other form of development.

Compensation for land acquired under a Purchase Notice will, in general, be assessed on the same basis as that of any other land compulsorily acquired.

A person with a private interest in Crown land can serve a Purchase Notice on the local planning authority, but only with the consent of the Crown and where the Crown has declined to acquire the interest in the first instance.

What should you do?

Seek advice from your property and legal advisers.
**Blight Notices**

Where a development plan shows a proposal such as a new road or an allocation of land for public purposes eg a sewage works, the owners of land affected by the proposal may be unable to sell their land, or to get planning permission. Where this is the case, the Town and Country Planning (Scotland) Act 1997, allows owners (principally resident owner-occupiers of houses and owner-occupiers of farms and small businesses) with an interest in land to serve a ‘Blight Notice’ on the appropriate authority.

In order to claim the right to serve a Blight Notice, a person must show that he has made reasonable endeavours to sell his interest in the land and that he has been unable to sell except at a substantially lower price than might reasonably be expected.

Where the interest of an owner-occupier of land has been blighted and a Blight Notice has been served, this will require the authority to purchase their interest. It should be noted that where a Blight Notice has been served, the authority may, within two months, serve on the owner a Counter Notice objecting to the Blight Notice. The Blight Notice procedure is, therefore, similar to a Purchase Notices, and is a form of reverse compulsory purchase.

The categories of blighted land include not only land shown in the approved or adopted statutory development plans as being required for public purposes, but also land in draft plans, proposed plan alterations, post-modifications and non-statutory plans.

Compensation is payable as on a compulsory acquisition, but ignoring any depreciation in value due to the blight.

**What should you do?**

1. Monitor land holdings and check planning proposals for their blight implications.

2. If applicable, instruct property advisers to serve a Notice in respect of blighted land to the appropriate authority.
Advertisements

Advertisements are controlled by the Town & Country Planning (Control of Advertisements) (Scotland) Regulations 1984 as amended by Amendment Regulations 1992. Local planning authorities are responsible for the implementation of the advertisement control system and for deciding whether a particular advertisement should be permitted or not.

The Regulations are complex, with some advertisements benefiting from deemed consent, while others require express consent so that it is necessary to obtain the planning authorities approval before displaying them.

The Department should, where it proposes an advert that would normally require ‘express consent’, follow the consultation procedures laid down in SDD Circular 21/84.

Advertisements may only be controlled with regard to two material considerations namely ‘amenity’ and ‘public safety’. Important factors to note are the presence of listed buildings, conservation areas or Areas of Special Advertisement Control. Advertisements fixed to listed buildings are subject to development control, requiring consent under the Regulations, and also listed building consent. Advertisements which are applied to non-listed buildings falling within a conservation area must ‘preserve or enhance’ the character or appearance of the conservation area.

Enforcement action can be taken against advertisements which do not have an express or deemed consent under the Regulations. Local planning authorities have the power to take ‘discontinuance’ action against advertisements installed under ‘deemed consent’ procedures.

Consent for an advertisement can be restricted to a number of years, but in practice a five year period is standard. All advertisements, whether requiring consent or not, are subject to standard conditions, eg that the site should be maintained in a clean and tidy condition and that no display should take place without the prior consent of the owner of the land. Other conditions may also be applied, for example, regarding illumination.

What should you do?

Check with property advisers to see if advertisement consent (and/or listed building consent) is required and note any time limits or conditions.
Environmental Impact Assessment (EIA)

European Council Directive 85/337/EEC (as amended by 97/11/EC) sets out requirements for the assessment of the environmental impact of certain development projects. The main aim is to ensure that the authority giving consent to a project makes its decision in the knowledge of any likely significant effects on the environment. Broadly speaking, these requirements apply where a project is likely to have significant effects on the environment by virtue of its nature, size or location.

The types of development project to which the assessment procedures apply are set out in the schedules to the Environmental Assessment (Scotland) Regulations 1999 (Scottish Statutory Instrument 1999 No.1). Assessments for projects falling within Schedule 1, whereby the nature or scale of the project is always likely to have significant environmental effects, e.g., nuclear power stations, oil refineries and steelworks, are mandatory. Assessments for projects falling within Schedule 2, e.g., agriculture, extractive industries and metal processing, are only required if it is judged likely to have a significant effect on the environment. Scottish Executive Planning Advice Note PAN 58 gives guidance on the 1999 regulations.

The assessment of anticipated impacts is set out in an ‘Environmental Statement’, which it is the responsibility of the applicant to provide. This process is commonly referred to as an Environmental Impact Assessment (EIA).

The statement then comprises an essential part of the planning application which the local planning authority must assess, along with the public consultations upon it and all other material considerations.

What is important about Environmental Statements is that they are intended to be a systematic analysis (for the purposes of public scrutiny) of environmental information in relation to major development proposals. The analysis will examine, inter alia, environmental benefits and disbenefits and the scope for modifying or mitigating them. Such analysis enables local planning authorities to properly evaluate the environmental issues relating to major development proposals before a decision is taken.

Local planning authorities may require an independent assessment or review of submitted Environmental Statements.

What should you do?

(see over)
What should you do?

1. Your property adviser will advise whether an EIA is required for a development or change of use.

2. Instruct property advisers to prepare an EIA if necessary.
Special Planning Areas

The Government has placed special emphasis on urban regeneration as part of its strategy for the sustainable use of resources. This emphasis has particularly focused on formerly developed urban areas which for various reasons are now perceived by the market as unattractive for business and/or development. In order to redress the balance the Government has designated certain areas within which ‘red tape’ is reduced and incentives are available.

The particular designation depends on the economic and social conditions prevailing. There are a variety of land use designations currently in operation. These include the following:

Urban Development Corporations (UDCs)

The Minister for the Environment, Transport and the Regions is empowered to set up UDCs in order to secure the regeneration of areas by bringing land and buildings into effective use, encouraging the development of new industry and commerce, creating an attractive environment and ensuring that housing and social facilities are available to encourage people to live and work in an area. In addition to the normal planning powers available to a local authority, UDCs can acquire, manage and dispose of land, carry out development and establish businesses. They are administered by non-elected board appointed by the Minister. It is doubtful whether any additional UDCs will be created as they are not favoured in political terms by the Scottish Executive.

Enterprise Zones (EZs)

These areas were originally set up as an urban regeneration initiative in the 1980s. The aim was to encourage industrial and commercial activity by removing certain tax burdens and other planning and administrative controls. Local authorities were invited by the Minister to propose EZ schemes setting out the areas affected and the nature of the benefits included.

Simplified Planning Zones (SPZs)

SPZs are normally promoted and designated by local authorities in older urban areas where there is a need to encourage economic regeneration. SPZs postdate EZs and were created to extend to other areas the planning regime benefits already established in EZs. Such zones benefit from the ‘deemed grant’ of planning permission (subject to any conditions or limitations attached) for certain types of development which are thought to assist in the promotion of economic activity. The effect of such designation is intended to encourage businesses to set up and expand more easily than would normally be the case.
**Compulsory Purchase**

Public authorities sometimes seek to acquire Government land or premises for public purposes eg highway **improvements**.

**Public authorities have no formal powers to proceed compulsorily against the Crown**, but in such cases Government Departments should co-operate as far as it is reasonably possible. Departments should, however, bear in mind that compliance with the acquiring authority’s request cannot be to the detriment of the public service, or involve compliance with conditions except at the cost of the acquiring authority.

Where Crown land is being acquired the Treasury has ruled that the compensation payable should be that which would have been payable as if the land had been acquired compulsorily.

Claims for disturbance in relation to Crown land need to be framed with particular care to ensure that no head of claim is overlooked. In view of the political difficulties in this type of case Government Departments should, at a very early stage, brief their property adviser on any sensitivities surrounding negotiations.

In some cases, eg in connection with road schemes, only part of the property belonging to the Government Department may be acquired and works in connection with the retained property may be necessary. The property adviser should always be consulted about such works of reinstatement.

The most common method of dealing with such reinstatement is for the acquiring authority to do the necessary works at its own expense. Sometimes, however, this is not practicable, eg because access by the local authority’s contractors to the premises is not appropriate. In the latter case, the cost of the works of reinstatement (plus any other relevant expenses) can be covered by a monetary payment. This should be based on an agreed ‘specification of work’ and the acquiring authority should be asked to accept this as part of the conditions of sale.

Where it is necessary or desirable to agree a cost estimate for works, this must be done in the knowledge that it may not be possible to review the settlement at a later date. The Government Department should also bear in mind that any such payment received is likely to be treated under “Government Accounting” as a Consolidated Fund Extra Receipt (CFER). Advice should therefore be taken on the financial implications.

**What should you do?**

Seek the advice of property and legal advisers where necessary.
**MGT 6.5**

**CONSERVATION**

**Introduction**

Current UK Government policy is largely derived from the 1990 White Paper “This Common Inheritance”, in which it was stated that the Government constantly aims for the highest standards of conservation and will ensure that those responsible for its historic buildings and environment are aware of the importance of the heritage they hold in trust. All Departments are committed by this policy, which extends to all protected sites and property of cultural value in the Government estate.

The information provided in this section has been broken up into two separate areas - the built environment and the natural environment.

The legislation current in 1999 consists of:

- Planning (Listed Buildings and Conservation) (Scotland) Act 1997;
- Ancient Monuments and Archaeological Areas Act 1979 and part of the Historic Buildings and Ancient Monument Act 1953; and
The Conservation Policy Framework

Government policy for historic buildings and areas in Scotland is set out in National Planning Policy Guideline 18, Planning and The Historic Environment. This document states a general presumption in favour of the preservation of both listed buildings and unlisted buildings, which make a positive contribution to the character or appearance of conservation areas.

There is also a need to take account of The Memorandum of Guidance on Listed Buildings and Conservation Areas (August 1998). This sets out in detail Historic Scotland’s responsibility for all who are involved in the development and listed building control processes. It also sets out the principles of and criteria for listing, and exclusions from the requirement for listed building consent.

Government policy on archaeology in Scotland is set out in National Planning Policy Guideline 5 (NPPG 5) Archaeology and Planning. Planning Advice Note 42 (PAN 42) Archaeology - The Planning Process and Scheduled Monument Procedures (1994) is also relevant. This document states that where nationally important archaeological remains, whether scheduled or not, and their settings, are affected by proposed development there should be a presumption in favour of their physical preservation.

In response to the 1990 White Paper (see Introduction), a Plan of Action for buildings was issued by the former Department of the Environment in 1991, which sets out recommended procedures and good practice to be followed by Departments and agencies. This Plan of Action was revised and reissued in 1996 through the CAU at PACE as Information Note 17/96. An updated revision of the Plan of Action is reproduced in “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies”, at Appendix 1.

Types of Protection

Historic buildings are buildings or other structures of architectural merit or historic interest. They may enjoy statutory protection as listed buildings or scheduled ancient monuments. There are other types of built heritage which do not benefit from statutory designation, but where their preservation may be a material consideration in the determination of a planning application. These include unscheduled monuments, historic parks and gardens and unlisted buildings where these make a positive contribution to the character or appearance of designated conservation areas.
What should you do?

Make enquiries with the local planning authority, in the first instance, to ascertain which types of protection apply and any related constraints. If in doubt, consult the Historic Scotland and the Royal Commission on the Ancient and Historic Monuments of Scotland, both based in Edinburgh.
**Crown Notification Procedures**

Although development by the Crown does not require planning permission, or listed building consent or scheduled monument consent, there are parallel procedures in place whereby Government Departments are required to obtain clearance for works to listed buildings or scheduled monuments. They are required to notify local planning authorities of their proposals for development, or other alterations. Arrangements for notifying local authorities are set out in Scottish Office Circular 21/84 Crown Land and Crown Development.

Similarly, Departments are required to notify local planning authorities and obtain clearance regarding any proposals for demolishing, altering or extending a listed building, and any proposal which involves demolition in a conservation area, subject to the exclusions set out in the Memorandum. An example of these exclusions from conservation area controls is ‘any building with a total cubic content not exceeding 115 cubic metres’.

The local authority deals with the notification as if it were a normal application for planning permission or listed building consent and advertises it in the usual way. Any objections received are passed on to the developing Department. In most cases any objections are overcome by negotiation between the Department and the local authority. In the rare cases where there is an unresolved dispute the matter is referred to the Minister who will either deal with the matter on the basis of written representations or hold a non-statutory public inquiry.

In the case of Crown development affecting a scheduled ancient monument, the developing Department will notify the Historic Scotland.

**What should you do?**

1. Contact the local planning authority to establish whether a notification procedure is required.

2. Refer to paragraph 3.7 in “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies”.

MGT 6.5.2
Listed Buildings

Buildings and structures of special architectural or historic interest are protected by listing under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Any addition to the statutory list requires the approval of the Minister for the Environment and Transport after consultation with Historic Scotland.

Listed buildings are divided into three categories: Grade A, Grade B*, and Grade C (S) according to merit. Grade A listed buildings are considered to be of exceptional importance, either architectural or historic. Grade B* buildings are buildings of particular importance, perhaps containing outstanding features. Grade C (S) buildings are those of local importance, which warrant every effort being made to preserve them.

The protection afforded to a listed building extends to its interior and to any historic fixtures and fittings. Objects or structures within the curtilage of a listed building, unless constructed after July 1948, are also protected.

Government Departments should seek listed building clearance for any proposal to demolish a listed building completely or in part or to alter or extend it in any manner which would affect its character as a building of special architectural or historic interest.

It is recommended that Departments undertake informal consultation with the Historic Scotland, early in the development of a project, prior to seeking clearance. This is intended to help Departments to set a good example in the care of their historic estate, in accordance with the Government commitment set out in the revised nine point plan of action.

A local planning authority may serve a building preservation notice on the owner and occupier of an unlisted building that is of special architectural or historic interest, and is in danger of being altered or demolished – see section 3 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. Building Preservation Notices are rarely used and the Crown is immune in relation to them.

GHBAU has published “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies”. This sets out policies, principles and procedures for the care of historic buildings and other property of cultural value within the Government estate.
A fundamental requirement of the recommended procedures is to maintain a system of quadrennial inspections, whereby an inspection and report on the condition of each historic building is commissioned from specialist conservation consultants every four years.

Local planning authorities aim to determine applications within eight weeks. However, in practice many decisions take longer. The risk of delay can be reduced by discussing any proposal with the LPA prior to notification and ensuring that any notification is supported by sufficient information (for example detailed plans, photographs and supporting information). Developing Departments are advised to contact the LPA during the eight-week period to ascertain if there are issues which require clarification, or which may be contentious.

**What should you do?**


2. Take specialist advice on any works to a listed building or the potential listing of a building by Historic Scotland. GHBAU maintains a register of specialist conservation consultants and can advise on the appointment of the appropriate specialists.

3. Seek clearance from the local planning authority wherever necessary for works to a listed building. Consult the local planning authority and GHBAU at an early stage and allow sufficient time for the notification/clearance procedures.

4. Establish and maintain a regime of quadrennial inspections and reports.
Scheduling of Ancient Monuments

Scheduled monuments include buildings (usually not in use), standing ruins or individual stones, and the land around them; or they may be buried below ground or beneath later buildings. The Minister for the Environment and Transport compiles a Schedule of Monuments based on the recommendations of Historic Scotland, the Ancient Monuments Board for Scotland, and the Royal Commission on the Ancient and Historical Monuments of Scotland.

Government Departments should seek scheduled monument clearance from Historic Scotland for any works to a scheduled monument involving demolition, removal or repair of any part, alteration or addition, any flooding or tipping operations, trenching or other disturbance to the ground surface of the site. Clearance can be granted only for detailed proposals – there is no provision for granting outline clearance.

Historic Scotland has appointed a number of Ancient Monuments Wardens throughout Scotland whose work helps to deliver advice to landowners. The Minister takes the advice of the Ancient Monuments Board for Scotland in relation to scheduling, re-scheduling and de-scheduling.

There is no statutory timetable for the determination of a SMC. However Historic Scotland aims to determine applications within 10 weeks of being notified of the application. A SMC lasts for five years from the date of its grant.

What should you do?

1. Obtain information about the location and scheduled status of any archaeological remains from Historic Scotland or from Royal Commission on the Ancient and Historic Monuments of Scotland.


3. Seek clearance from Historic Scotland wherever necessary for works to a scheduled monument and allow sufficient time for the notification/clearance procedures.
Archaeology and Development

Archaeological remains must be treated as finite and non-renewable. In many cases they are highly fragile and vulnerable to damage and destruction. Where nationally important archaeological remains, whether scheduled or not, and their settings are affected by a proposed development, there is a general presumption in favour of their physical preservation in situ.

Normally, local planning authorities would, through their development plan, identify locations where potential sites of archaeological interest lie. When important remains are known to exist developers would be expected to establish, by means of an approved archaeological survey, the nature and extent of the archaeological remains. Local planning authorities may require the physical preservation of the archaeological finds, which may impact on the development proposed. If physical preservation in situ is not feasible an archaeological excavation for the purposes of preservation by record may be an alternative, but this will have timing and cost implications for any proposed development, which may affect the viability of the project.

When important remains are known to exist or when archaeologists have good reason to believe that important remains exist, early consultation should be undertaken with the local planning authority if development is being considered which may affect the site. This may require an early field evaluation to be undertaken by an archaeologist to discover the type of remains that exist.

What should you do?

1. Obtain information about the location and scheduled status of any archaeological remains from Historic Scotland or from the Royal Commission on the Ancient and Historic Monuments of Scotland.

2. Consult Historic Scotland at an early stage regarding development proposals which may affect an archaeological site. Seek clearance from Historic Scotland wherever necessary for works to a scheduled monument and allow sufficient time for the notification/clearance procedures.

3. Instruct specialist advisors to advise on development proposals. Historic Scotland can provide the names and addresses of archaeological units and trusts which undertake consultancy and advisory work.

MGT 6.5.6 **Historic Gardens, Parks and Designed Landscapes**

An Inventory of Historic Gardens and Designed Landscapes in Scotland is compiled and maintained jointly by Historic Scotland and Scottish National Heritage. The effect of proposed development on an historic garden or designed landscape is a material consideration in the determination of a planning application. Planning authorities must consult with the Minister and Scottish National Heritage on any proposed development that may affect a site contained in the inventory. Although inclusion of a historic park or garden in the inventory in itself brings no additional statutory controls, inclusion can assist in the protection of such sites because local authorities are required to protect them in preparing development plans and in determining planning applications.

**What should you do?**

Make enquiries with the local planning authority, in the first instance, to ascertain whether your site is included in the inventory of historic parks and gardens. If in doubt, consult Historic Scotland and Scottish Natural Heritage.
Conservation Areas

Under the Planning ( Listed Buildings and Conservation Areas) (Scotland) Act 1997, local planning authorities have a duty to designate as conservation areas any ‘areas of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance’. This is in recognition of the fact that the character and historic value of a town or village is often derived from such areas, even though the individual buildings within such an area may or may not be of sufficient interest to be included in the statutory list.

Conservation area designation introduces a general control over the demolition of unlisted buildings and provides the basis for planning policies designed to preserve or enhance all aspects of character or appearance which define an area’s special interest. Designation results in control over works to trees. Local planning authorities may also further restrict development by removing permitted development rights.

Government Departments should seek conservation area clearance for any proposal which involves demolition in a conservation area, subject to the exclusions set out in the Memorandum of Guidance on Listed Buildings and Conservation Areas (August 1998).

What should you do?

1. Refer to “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies” Section 3.5 and 3.7, and NPPG 14 Natural Heritage.

2. Make enquiries with the local planning authority to ascertain the boundaries of any conservation area affecting your property, and to ascertain any additional planning controls that arise. Many local authorities provide helpful maps and guidance which explain the consequences of designation.

3. Seek clearance from the local planning authority wherever necessary for works in a conservation area. Consult the local planning authority at an early stage and allow sufficient time for the notification/clearance procedures to take their course.
**Tree Preservation Orders**

A local planning authority may make a Tree Preservation Order (TPO) in the interests of amenity for the preservation of such trees, groups of trees or woodlands as may be specified in the Order. A TPO prohibits the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of trees without consent and it is a criminal offence to do so without permission where a TPO is in force.

TPOs cannot be made in respect of Crown land, but a local planning authority may make a TPO on Crown land in anticipation of disposal of that land. The Order does not come into effect until either the land ceases to be Crown land or becomes subject to a private interest (whichever occurs first). The Order will remain in force until the expiry of 6 months after it ceases to be Crown land or until the Order is confirmed as described above.

Although TPOs cannot be made in respect of Crown land where a disposal is not envisaged, Government Departments should have regard to the potential environmental and community impact of tree removal. They should also adopt good management practice for trees within their estate, which may be assisted by carrying out a tree survey.

A local planning authority, after making a TPO, is required to serve a copy of it on the owners and occupiers of the affected land, informing them that objections and representations may be made within 28 days of service of such a Notice. The local planning authority must take these into consideration and decide whether or not to confirm a TPO, with or without modifications. When a TPO is confirmed, the local planning authority must notify the owners, occupiers and the District Valuer and the TPO is also registered as a local land charge. Once confirmed, the local planning authority's consent is required to undertake any works to trees protected by a TPO.

**Failure to respond within the statutory 28 day period will lose the right to submit representations and objections.**

**What should you do?**

1. Refer to Section 3.5 and 3.6.2 of “The Care of Historic Buildings and Ancient Monuments: Guidelines for Government Departments and Agencies”.

2. Create and maintain a record of TPO documents.

3. Instruct a property adviser to respond to any notices and to advise on obtaining consent when works affecting a tree subject to a TPO are necessary.
MGT 6.5.9

Nature Conservation

The Government's aims for nature conservation are set out in NPPG 14 Natural Heritage. This takes as its starting point the Government's commitment to sustainable development. In essence the Government's approach is that, whilst adequate provision for development and economic growth must be made, policies must also contribute to the conservation of the abundance and diversity of British wildlife (or minimise the adverse effects on wildlife and habitats where conflicts of interest are unavoidable).

The Wildlife and Countryside Act 1981 (as amended), in combination with other legislation, provides special protection to a number of listed, endangered species wherever they might occur; that is, protection is not restricted to designated sites. Species which are commonly involved in development cases include badgers, great crested newts and bats, the last often feature when carrying out maintenance work. Systems to deliver protection are in place, involving the duty to notify Scottish Natural Heritage of the presence of the species prior to work commencing, inspection, advice and the possible issuing of licences or permits.

The conservation of wildlife is primarily achieved through the protection of the habitat on which it depends. Although this is not confined to specially designated areas, particular attention is paid to such issues within "Sites of Special Scientific Interest" (SSSIs).

Scottish Natural Heritage is the agency responsible for advising central government and local government on all aspects of Scotland's natural heritage. The general aims and purposes of Scottish Natural Heritage, specified in the Natural Heritage (Scotland) Act 1991, are to:

- Secure the conservation and enhancement of the natural heritage, including its flora and fauna, geological and physiographical features, and its natural beauty and amenity;

- Foster the understanding and appreciation of the natural heritage; and

- Facilitate the enjoyment of natural heritage through the development of appropriate access arrangements, recreation provision and interpretative facilities.

The Act obliges Scottish Natural Heritage to seek to ensure that anything done in relation to the natural heritage, whether by Scottish Natural Heritage or anyone else, is undertaken in a sustainable manner. The agency has a statutory role in development plan preparation and development control and can advise planning authorities and others on a wide range of natural heritage issues.
NPPG 14 states that nature conservation objectives should be taken into account in all planning activities which affect rural and coastal land use, and in urban areas where there is wildlife of local importance. This should be reflected in regional planning guidance, structure plans, unitary development plans and local plans.

Nature conservation can be a significant material consideration in determining planning applications, especially in or near SSSIs, or where there is a statutory requirement to consult Scottish Natural Heritage.

Under Directives 92/43/EEC and 79/409/EEC, the Government must identify Special Areas of Conservation and Special Protection Areas and special rules apply to planning considerations within such areas. The Government has recently identified approximately 200 wildlife sites, which are proposed to be designated under the habitats, species and birds directives. The sites will be designated Special Areas of Conservation (SACs) for habitats and species, and Special Protection Areas (SPAs) for birds. The majority of sites will be based on existing SSSIs.

**What should you do?**

1. Monitor land holdings and check to see if nature conservation interests affect them.

2. Contact Scottish Natural Heritage for relevant guidance.
Sites of Special Scientific Interest (SSSIs)

The Wildlife and Countryside Act 1981 (as amended) introduced the most comprehensive system of wildlife conservation seen in this country, based on a network of Sites of Special Scientific Interest (SSSIs). These are designated by Scottish Natural Heritage and the Countryside Council for Wales on the basis that the land is of special interest by reason of its flora, fauna or geological or physiographical features. If a landowner/occupier wishes to carry out an operation that might damage the special interest of the site, Scottish Natural Heritage must be notified.

Sites are identified on the basis of published scientific criteria and the designation of an SSSI is to protect their nature conservation interests. Scottish Natural Heritage must notify the sites to their owners and occupiers, the local planning authority, the Scottish Environment Protection Agency and the Minister for the Environment and Transport. Interested parties can make representations to Scottish Natural Heritage, who after the initial notification must decide within nine months whether or not it should stand.

There is a general presumption against development within SSSIs but, where appropriate planning obligations can accompany permissions in order to secure the long term management of nature conservation interests.

Even if a proposal does not require planning permission Scottish Natural Heritage must be contacted at an early stage in order to discuss whether the proposal constitutes an operation likely to damage. If so, a consent may be issued.

What should you do?

1. Instruct property advisers to make representations upon notification of SSSI designation.

2. Instruct property advisers to submit any planning applications on land with such a designation.

3. Contact Scottish Natural Heritage for relevant guidance.
MGT 6.5.11  **Natural Heritage Areas and National Scenic Areas**

Natural Heritage Areas have superseded National Scenic Areas but the existing 40 NSA’s will continue, although some may be re-designated as NHA’s. The introduction of National Parks may supersede the NHA designation.

NHA’s may be designated by the Minister for the Environment and Transport on the recommendation of Scottish Natural Heritage. These areas should be of outstanding value to the natural heritage of Scotland. The designation is similar to the Area of Outstanding Natural Beauty designation in England and Wales. Development control decisions affecting NHA’s should favour conservation of the landscape.

**What should you do?**

1. Check if designation applies to the landholding.

2. Instruct property advisers to advise on any planning application made in an NSA or NHA.

3. Contact Scottish Natural Heritage for relevant guidance.
National Parks

The current position regarding National Parks in Scotland is set out at paragraph 33 of NPPG 14 Natural Heritage:

“The Government supports the establishment of a National Park for Loch Lomond and the Trossachs. It also believes that a National Park should probably be created in the Cairngorms and has asked Scottish Natural Heritage to identify other areas which could benefit from National Park status in order to prepare the way for legislation by the Scottish Parliament. While conservation of the natural heritage will be a key objective in any National Park, the Government considers that due weight must also be given to the social and economic interests of local communities. Scottish Natural Heritage has been asked to advise on appropriate organisational structures and management strategies and to prepare proposals on the powers required in each area. In the meantime, planning authorities should take particular care to safeguard the landscape, flora and fauna of Loch Lomond and the Trossachs and the Cairngorms.”

What should you do?

1. Instruct property advisers to advise on any planning applications within areas proposed to be designated as National Parks.

2. Contact Scottish Natural Heritage for relevant guidance.
MGT 6.6.1 Planning Contravention Notices

The Town and Country Planning (Scotland) Act 1997 enables local planning authorities to serve 'Planning Contravention Notices' to obtain information prior to enforcement action, and to engage in a dialogue with those thought to be in breach of planning control.

**Government Departments benefit from Crown Immunity and therefore cannot be subject to a Planning Contravention Notice.**

A Notice may be served where it appears to the local planning authority that there may have been a breach of planning control. It will require the owner or occupier of the land to supply information as to: a) any operations or other activities being carried out on the land; or b) any matters relating to the conditions or limitations, subject to which planning permission in respect of the land has been granted.

The objectives of a Notice are to:

- give a formal warning of enforcement action;
- require the recipient to remedy any breach of planning control at an early stage;
- give the recipient the opportunity to conform with planning applications/obligations etc; and
- obtain the recipient's response.

A Planning Contravention Notice may give notice of the time and place when the recipient of the Notice must: a) offer to apply for planning permission; b) offer to refrain from carrying out operations or activities; and c) any other representation. The period for compliance with a Planning Contravention Notice is 21 days, beginning with the day on which the Contravention Notice is served.

If recipients of a Planning Contravention Notice fail to comply then this renders them guilty of an offence.

What should you do?

(see over)
What should you do?

1. If a Planning Contravention Notice is received, consult with property advisers.

2. Monitor deadlines and ensure that the information requested by the Notice is supplied within the given time period.
Enforcement Notices

No Enforcement Notice can be issued in respect of development carried out by the Crown or on behalf of the Crown.

Where land remains in Crown ownership and a person with no interest in the land has undertaken development a Special Enforcement Notice procedure applies. The procedure is analogous to the enforcement matters prescribed under the 1997 Act, but Special Enforcement Notices can only be served with the permission of the ‘appropriate authority’ i.e. the Government Department.

If Crown immunity is removed, then the 1997 Act will apply as follows:

1. An Enforcement Notice is served on the owner and the occupier of the land to which it relates, where the local planning authority believes there has been a breach of planning control.

2. The Enforcement Notice must state the matters which constitute the breach of control and whether it is related to the carrying out of the development or a breach of conditions.

3. It must also set out what action is required to be taken to remedy the breach of control alleged.

4. Enforcement action may only be taken before the expiry of four years after the initial breach in the case of changes of use or breach of condition.

If no appeal is lodged with The Minister for the Environment and Transport and the Notice is not complied with, a local planning authority may proceed to take action against the offender and the Courts may impose a fine.

Failure to comply with an Enforcement Notice is a criminal offence. Additionally, local authorities have the power to undertake works to ensure compliance and recover costs. Alternatively, the local planning authority may enter a property without notice, execute the requirements of an Enforcement Notice and recover expenses from the owner of the land.

What should you do?

1. Advise the originator that because of Crown immunity an Enforcement Notice cannot be served against the Department.

2. Instruct property adviser to investigate the circumstances that gave rise the issue of the Enforcement Notice and take appropriate action.
**Stop Notices**

No Stop Notice can be issued in respect of development carried out by the Crown or on behalf of the Crown.

Once an Enforcement Notice has been served, a Stop Notice may be served in conjunction with it, which allows a local planning authority to impose a ban, almost immediately, on activities that are being carried on in breach of planning control. A Stop Notice directs that any specified activity (being carried out on land in respect of which an Enforcement Notice has been served) shall stop, notwithstanding that the Enforcement Notice itself has yet to come into effect.

Stop Notices are discretionary and rarely used because, if a Stop Notice is later withdrawn, varied or quashed at appeal, compensation is payable.

A Stop Notice is normally only contemplated when a use is clearly in breach of control and creating a severe amenity problem. Whereas an appeal against an Enforcement Notice suspends its effect this is not the case with a Stop Notice.

There is immunity from serving a Stop Notice on a dwelling house or where ‘activities’ have been carried out for more than four years.

**What should you do?**

1. Advise the originator that because of Crown Immunity a Stop Notice cannot be issued against the Department.

2. Instruct property adviser to investigate the circumstances that gave rise the issue of the Stop Notice and take appropriate action.
MGT 6.6.4  Breach of Planning Conditions

The Crown benefits from immunity against enforcement procedures.

If Crown immunity is removed the ‘Breach of Condition Notice’ procedure will apply.

In July 1992, powers came into force enabling local planning authorities to serve Breach of Condition Notices where conditions, attached to planning permission, have not been complied with. Prior to this date, any breach of condition was enforceable only by conventional enforcement procedures. New legislation removed any right of appeal to the Minister and therefore anyone in receipt of such a Notice may only defend it in the Court of Session on the ground that the notice is beyond the powers (ultra vires) of the planning authority to serve.

It is an offence to fail to comply with such a Notice.

As with enforcement procedures directed against breach of conditions, the ten year rule is applicable, ie enforcement action may only be taken before the expiry of ten years.

What should you do?

1. Advise the originator that because of Crown Immunity a Breach of Condition Notice cannot be issued against the Department.

2. Instruct property adviser to investigate the circumstances that gave rise the issue of the Breach of Condition Notice and take appropriate action.
**MGT 6.6.5  Discontinuance Order**

As the Crown benefits from immunity against enforcement procedures, a Discontinuance Order will not apply unless the immunity is removed.

Local planning authorities have the power to serve a Discontinuance Order, if it appears expedient to do so in the interest of the proper planning of their area. The importance of the Discontinuance Order is that it may be directed against any existing lawful use of land, or require the removal or alteration of any buildings or works that are lawful. Its limitation is that compensation becomes payable (with the Lands Tribunal determining the exact amount where matters are in dispute).

Such a power is used only in exceptional cases where the alternative of enforcement or the use of other legal powers is not available.

A Discontinuance Order may be directed at uses of buildings and works. An Order may have conditions attached which specify the way in which development is to be discontinued or may state that the continuance is permissible subject to requirements or restrictions.

**What should you do?**

1. Advise the originator that because of Crown Immunity a Discontinuance Order cannot be issued against the Department.

2. Instruct property adviser to investigate the circumstances that gave rise the issue of the Discontinuance Order and take appropriate action.
**MGT 6.6.6 Abandonment**

Whether abandonment has occurred or not is ‘a matter of fact and degree’in each circumstance. Case law has generally determined that abandonment has occurred when a use is deliberately ceased and premises or land are left vacant for a considerable period, or a different use is instituted, whether with planning permission or not.

If use of land or buildings is judged to have been temporarily discontinued, case law has held that the resumption of that use is not development. If, however, a use is judged to have been permanently discontinued, it would appear that the revival of that use is development which may require planning permission.

If a local planning authority considers that abandonment has taken place, any resumption of the use can result in enforcement action being taken. Enforcement action cannot be taken against the Crown, but the local planning authority may request the Department to consult them on the resumption of a use under the Circular 21/84 procedure.

A abandonment of use may technically result in a ‘nil use’ of land, from which any change would be a ‘material’ one and would therefore require planning permission.

**What should you do?**

1. Before resumption of use, consider the possibility that the use may have been regarded as abandoned.
2. Check the health and safety implications of any vacant premises.
3. Consult the Loss Prevention Council’s “Code of Practice for the Protection of Unoccupied Buildings”.

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**Interdict**

The Crown is immune from enforcement action and as such an interdict for breach of planning control will not apply unless Crown immunity is removed.

Interdicts are a swift and effective way for a local planning authority to restrain unauthorised development. The Town & Country Planning (Scotland) Act 1997 enables a local planning authority to seek interdict from the Sheriff Court or the Court of Session, provided they consider it expedient for the promotion or protection of the interests of the inhabitants and its administrative area.

An interdict is no longer the last form of statutory remedy once all others have been tried. It can be used in cases where local authorities are or are not proposing to exercise any of their other powers. Interdicts can also be granted against persons whose identity is unknown, in order to restrain a breach of planning control, in relation to tree preservation, listed buildings, conservation areas, demolition of buildings and hazardous substances. This provision allows the Courts to intervene quickly to prevent serious and irreparable harm occurring without going through the lengthy process of finding out identities of owners.

**What should you do?**

1. Advise the originator of the Interdict that the Crown benefits from immunity from breach of Planning Control.

2. Instruct property adviser to investigate the circumstances that gave rise the issue of the Interdict and take appropriate action.
Government Departments or previous owners of land and property may have undertaken various processes and activities on land now in Crown ownership which may have given rise to various forms of contamination eg storage of fuel oils, the use of asbestos insulation of service pipes, solvents, munitions and nuclear industry related.

Ever since the 1936 Public Health Act it has been possible to take abatement action on contaminated land, but contamination did not become a major property issue until the 1980s. Since then, there has been increasing public concern about the impact of pollution on the environment and the need for an integrated approach to its control.

DoE Circular 21/87 made the presence of contamination a material planning consideration, but what really brought matters to the fore was the “First Report on Contaminated Land” from the House of Commons Select Committee on the Environment. The Government’s response to this Report identified three key areas for further action. These were:

- information on where land may be contaminated;
- quality assessment criteria; and
- technology and funding for clean-up.

The Environmental Protection Act 1990 attempts to address these concerns by providing a comprehensive legal framework for dealing with all forms of pollution of the environment. Section 159 of the Act applies the provisions of the Act to the Crown.

The significance of the Act for Government Departments is that the costs of complying with the requirements of the legislation may be such as to turn a property asset into a property liability.

The Environment Act 1995 established the Scottish Environment Protection Agency (which became operational from 1 April 1996). This brought together the functions of the seven river purification boards, HM Industrial Pollution Inspectorate, the waste regulation and local air pollution functions of the district and islands councils and some functions of the Scottish Office.
In general the Act establishes the principle that the ‘polluter pays’ i.e. that the person responsible for creating contamination is liable for its remediation in the first instance. Where that person cannot be identified or found, however, the liability falls on the present owners and/or occupiers. Thus, where the polluter cannot be found, it is possible that a Government Department, occupying a building under a lease, could be served with a notice requiring the land to be cleaned up. In practice, the Guidance Notes provide for apportionment of the cost of cleaning up between landlord and tenant, with account being taken of the relative values of the landlord’s and the tenant’s interests in the property.

Since 1990 there has been a protracted period of public debate about the most effective way to implement those elements of the Act which relate to contaminated land, whilst avoiding major disruption to the property market.

Initially it was proposed to introduce, under S143 of the Act, a “Public Register of Land Which May Be Contaminated”. However, given the UK’s industrial heritage, this proposal would have included a huge number of sites on the Register. Also, many of the sites proposed to be included were either not contaminated, or had been contaminated but cleaned up. It was therefore strongly resisted by the property industry, because of its potential blighting effect on property values and development and this proposal was dropped in March 1993.

However, although registers in the form initially proposed were dropped, the threat of registers was sufficient to raise awareness of contamination as an issue. As a result, companies, lawyers and financial institutions now carry out pre-acquisition checks as a matter of course to avoid picking up environmental liabilities.

Government Departments should also be aware of the following points:

1. ‘Suitability for Use’

The Government’s policy on the level of remediation is that a balance should be struck between the costs and environmental benefits of remedial action. The Government is committed to the ‘suitable for use’ or ‘fitness for purpose’ approach to the control and treatment of existing contamination.

The ‘suitable for use’ approach requires remedial action to be undertaken only where contamination poses unacceptable risks to health or the environment and where there are appropriate and cost-effective means available to do so, taking into account the actual or intended use of the site. It follows, for example therefore, that remediation standards on a contaminated site would be higher for a residential redevelopment involving the creation of substantial areas of garden, than for an industrial development where the majority of the site is covered in hard surfaces.
2. Remediation Registers

The Government has confirmed that Part IIA of the Environmental Protection Act 1990 will be implemented with effect from July 1999. This will introduce a new statutory regime for the identification and control of contaminated land.

If instigated in its draft form, the legislation will result in ‘Remediation Registers’ of contaminated land being prepared. However, the registers will be much different from the ill-fated Section 143 registers.

The important difference will be that sites will only be included if they are active, in the sense of containing hazardous substances which are causing significant harm, or there is a ‘significant possibility of significant harm being caused’, or pollution of controlled waters is being or is likely to be caused.

Local authorities will be responsible for the inspection and identification of such contaminated land, but they will have up to 15 months (from July 1999) to formulate their inspection strategies. They may also, after certain notification procedures, undertake or require investigations of land that appears to be contaminated.

If it is established that ‘significant harm’ is being caused, the local authority will have a duty to issue a ‘Remediation Notice’ to require appropriate remediation measures to be undertaken. These will be described in a ‘Remediation Statement’ which will form part of the ‘Remediation Register’. Government Departments should take legal advice on their potential liability in respect of such notices, whether as landlord or tenant.

However, local authorities may, by issuing notification of the intent to classify land as contaminated, ensure that many sites are remediated and thereby achieve the main objective of the legislation without recourse to publication in the Register and the inevitable impact on values.

Where a Remediation Notice is served, an appeal against the form of remediation required can be made to the Court within 21 days, or to the Secretary of State.

Failure to comply with a ‘Remediation Notice’ is an offence punishable by a fine of up to £20,000 and £2,000 for each day on which the failure continues. A local authority can carry out the work itself and recover the cost from the ‘responsible person’. 
3. Special Sites

Certain sites may be classified as ‘special’ and these are to be notified to and dealt with by the appropriate agency, such as the Environment Agency or the Nuclear Inspectorate. ‘Special sites’ are sites such as Ministry of Defence sites, and sites used for explosives production and petroleum refining.

Wherever possible it will clearly be beneficial for Government Departments to address any contamination problems outside of the legislative framework, in order to avoid having their land classified as contaminated. This will particularly be the case where a disposal is envisaged.

What should you do?

1. Ask property advisers to investigate any indications that any areas of potential contamination may exist on any of your premises.

2. Take advice from property and legal advisers on potential environmental liabilities where an acquisition is envisaged and on the need for environmental audits in advance of any anticipated property disposal and prior to any acquisition.

3. Instruct property and legal advisers to deal with ‘Remediation Notices’.

**ROADS AND PUBLIC RIGHTS OF WAY**

The terms ‘road’ and ‘public right of way’ both mean a way over which the public have a right to pass and re-pass.

The land over which a road passes is normally privately owned by the adjoining proprietors and, subject to any provision to the contrary in the title deeds, ownership is normally assumed to extend to the centre of the road. Where land is privately owned, the public road over it is maintainable by the roads authority concerns.

The ‘road’ authorities are the Scottish Minister for Transport for motorways, trunk roads and other special roads and the councils for all other public roads.

The Roads (Scotland) Act 1984 contains the principal powers enabling roads authorities to construct new roads or to make private roads into public roads, maintainable by the appropriate roads authority. In the case of the latter, a road may be created by the landowner firstly ‘dedicating’ the right to use the land for the benefit of the public at large and the public ‘accepting’ this right expressly or implied by use for a specific time.

The land over which some roads run is owned by the appropriate roads authority.
MGT 8.1  

**ADOPTION OF ROADS**

The provisions regarding the adoption of a road so that it is maintainable by the appropriate roads authority are contained in Part II of the Roads (Scotland) Act 1984. This may be done on a voluntary basis by the roads authority or in certain circumstances by compulsion, also by the roads authority. In particular it should be noted that a roads authority may compel an owner to make up a private road to a reasonable standard, as specified by the roads authority, before it is adopted.
MGT 8.2  

STOPPING UP AND DIVERSION OF ROADS

Where a road exists, whether public or private, it cannot be stopped or diverted without the promotion of an appropriate order under the Roads (Scotland) Act 1984 or the Town and Country Planning (Scotland) Act 1997.
PUBLIC RIGHTS OF WAY

A public right of way is a way over which all members of the public have a right of passage.

A right of way for an individual or group of people, other than the public at large, is a servitude right of access. Such private servitudes rights are for the benefit of particular pieces of land to which they relate.

If a private right of way is not used for a sufficient length of time, this may lead to a claim that it has become extinguished.

A right of way may come into existence either by the landlord giving the right to use a way over his land by express grant, or by use for the appropriate prescriptive period.
**COMPULSORY ACQUISITION OF ROADS**

Land acquisitions for the improvement of existing roads or for the creation of new roads, eg motorways, may be made compulsorily where it has not been possible to acquire the land by agreement. The detailed procedures governing the acquisition of land by compulsory means are set out in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The powers to acquire land compulsorily are continued in various Acts including the Roads and Town and Country Planning Acts. These Acts and associated regulations include, amongst other things, the basis for compensation for the loss of land and for other matters such as increased noise, dust, vibration and disturbance.

**Compulsory powers cannot be used to acquire Crown land.** However, land may be acquired with the agreement of the Department.
DISPOSALS
DISP 1.0  GENERAL

DISP 2.0  STRATEGY

DISP 2.1  SURPLUS PROPERTY
  2.1.1  DISPOSAL ADVICE
  2.1.2  PLANNING PERMISSION - DEVELOPMENT POTENTIAL
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DISP 2.2  FEUHOLD PROPERTY

DISP 2.3  LEASEHOLD PROPERTY
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DISP 3.0  SALE OPTIONS

DISP 3.1  METHODS OF SALE
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DISP 3.2  SHARING IN DEVELOPMENT VALUE
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  3.2.5  WORKS IN LIEU OF PAYMENT

DISP 3.3  CONCLUSION OF A CONTRACT AND SETTLEMENT
**GENERAL**

Disposals should be identified as part of the Property Plan. The strategic section of this Guide refers to the need to minimise surplus space and identify opportunities to release property. There should be a continual review of the portfolio as part of a process of rationalisation. The National Audit Office (NAO) recently published a report, “Ministry of Defence: Identifying and Selling Surplus Property” which offers advice on how to:

- reduce the amount of vacant property through re-use or disposal;
- control the costs of vacant property; and
- dispose of property on best terms.

Once surplus property has been identified liaison with PACE should take place in accordance with the Civil Estate Co-Ordination Agreement (CECA) and “Government Accounting” Chapter 30. The surplus property may be suitable for other Government Departments and this will be investigated by PACE. When considering disposal options priority should be given to re-use by another Government Department. Better value for the Exchequer is likely to result from estate rationalisation and re-use of existing stock within the Civil Estate, since this eliminates the costs associated with disposal and acquisition in the open market. Departments are accountable for their property decisions and should seek to minimise overall Exchequer cost.

All disposal decisions should be made in accordance with HM Treasury’s “Appraisal and Evaluation in Central Government (The Green Book)” and “Government Accounting” Chapters 30 and 32. PACE will assist by identifying and appraising various options. Rationalisation options should be explicitly considered if Departments are not to be left open to criticism.

Where the surplus property is not required within Government, alternative means of disposal may be considered. Feuhold property can be sold, and property held on lease might be released by the operation of break clauses or where the lease expires. Where it is not possible to release leasehold property in this way it will be necessary to consider other means such as sub-letting, assignation and/or surrender.

The following sections deal with the types of disposal available and the methods used in achieving them.

The disposal of property needs to be carefully considered and handled as such transactions are in the public domain.
Once property has been identified as surplus, it should be disposed of as soon as possible. The Department will also have considered the property’s position in its Property Plan and satisfied itself that a requirement is unlikely to arise in the foreseeable future.

Prior to disposing of any property Departments should liaise with PACE to ensure that it is not required to meet the accommodation needs of another Department (see above). It is also vital to investigate title to the property, the town planning background, contamination and how the property or land was originally acquired. PACE will need to be informed about these issues, as they could effect the option appraisal and disposal strategy.

Disposal of surplus property is dealt with in “Government Accounting” Chapter 32: Disposal of Assets. This sets out procedures and rules to be followed or considered when a Department wishes to dispose of its surplus property.

If the property or land was originally purchased by the Crown exercising powers of, or under threat of, compulsory purchase, under the “Crichel Down” principles, consideration should be given to offering first refusal to the original owner (see below).

Where the surplus property is also an historic building, Departments should have regard to the “The Disposal of Historic Buildings – Guidance Note for Departments and Non-Departmental Public Bodies”, issued by the Department for Culture, Media and Sport. The guidance note emphasises that ‘best price’ is not an overriding objective in the disposal of historic buildings (see below).

Where property is to be left vacant Departments should consider disconnecting non-vital services in order to minimise overheads. However, consideration should be given to maintaining services where they are important in preventing deterioration of the property. This is particularly important in the case of historic buildings, but also more generally where it would contribute to maintaining saleability and market value. It may also be necessary to take extra security measures.
Relief from CILO R (Contributions in lieu of Rates)/Business Rates can be obtained on empty property so Crown Property Unit of the Valuation Office Agency or, after 1 April 2000, the local authority should be informed as soon as a property becomes vacant.

What should you do?

1. Obtain advice on title from legal advisers.

2. Make investigations into whether the property was purchased compulsorily or under threat of compulsion. If this is the case, seek legal and property advice.

3. Obtain advice on the relevant development plan policies and town planning background, including whether the property is an historic building, as all these factors will affect your decision on how to proceed with disposal.

4. Inform PACE of the surplus space and ensure that the surplus land is entered onto the land registers if it falls within the criteria standing at the time and instruct property advisers to market the property once clearance from PACE is given.

5. Inform the Crown Property Unit or local authority and insurers, if applicable, that the property is vacant. Reduce unnecessary overheads.

6. Consider the need to investigate potential contamination on the site/property.

7. Consider the need for maintenance of services and site/property security and consult the Loss Prevention Council’s “Code of Practice for the Protection of Unoccupied Buildings”.
**DISP 2.1.1 Disposal Advice**

In general, suitably qualified agents from the private sector will need to be appointed to handle sales. These are referred to as selling agents. The property adviser can also be the selling agent.

Before a property is offered for sale it should be professionally valued. **Departments** may use their own professional valuation staff where they have appropriate and adequate expertise, or the District Valuer, or suitably qualified private sector valuers. In cases where the property is not substantial or not potentially difficult to sell the selling agent/property adviser may also provide the valuation. The selling agent will advise on marketing strategy, establish a guide price and, in the case of a sale by **auction** or **tender**, a provisional reserve price. In major or potentially difficult cases, e.g., an unusual or exceptional property, uncertain planning situation or where the likely sale price will be over £5 million, the professional valuer should be independent of the selling agent. This valuer should advise independently on proposed guide and reserve prices, the suitability of bids received, any legitimate (higher) bids received after the closing date in a **tender** process and the final sale price where it is below the initial guide price. The selling agent should be informed in all cases where an independent professional valuer is appointed.

If the independent valuer and the selling agent are unable to agree on any particular aspect, the **Department** should discuss thoroughly the reasons with both sets of advisers and make a decision in the light of the facts and the arguments.

The **Department** and its advisers should formulate a negotiating strategy that will guide the process from start to finish. The property and legal advisers should advise on this strategy and assist the **Department** in ensuring that its negotiating strength is maintained until all the money from the disposal has been received.

**Departments** should be aware that property investment is a prime target for money launderers and that anyone knowingly dealing with or receiving illegal funds is liable for up to 14 years in prison and an unlimited fine. **Departments** should therefore ensure that their property advisers adopt best practice procedures to satisfy themselves as to the identities and bona fides of prospective purchasers.

**What should you do?**

(see over)
What should you do?

1. Prepare instructions for the selling agent/property adviser requiring account to be taken of alternative uses and/or development potential. ("Government Accounting" Chapter 32 and SO Circ 21/84).

2. Ensure that advisers and valuers are aware of the special provisions relating to the disposal of historic buildings in Government ownership. ("The Disposal of Historic Buildings - Guidance Note")

3. Appoint an independent valuer in addition to the selling agent/property adviser in complex cases or where the likely sale price will be over £5 million.

4. Devise a negotiating strategy with the help of advisers.
DISP 2.1.2  Planning Permission - Development Potential

A purchaser may be able to continue a use instigated by the Crown. It may be helpful to obtain written confirmation of the existing lawful use from the local planning authority. Such a letter may not have any legal effect, but it may provide some comfort for prospective purchasers. SO Circ 21/84 provides helpful guidance (see below).

Where a Department has surplus property that it considers has development potential, it can apply in advance of disposal for planning permission through the normal planning process under the Town and Country Planning Scotland Act 1997.

Where a Department wishes to develop property for its own purposes, it should follow the formal consultation procedure under Circular 21/84.

When considering any development, investigations should be made into the property's planning history to establish that the use to which it is being put and the existence of any buildings are lawful. Although the Department may not require planning permission by virtue of its status, it is likely that, if the property is to be disposed of, a purchaser will require consent, so consideration should be given to obtaining the requisite planning permission.

It may also be desirable to obtain planning permission for a particular use in order to maximise the sale price. This could speed up the sale process, as offers will be less likely to be subject to obtaining planning permission, although delay may then arise out of the planning process. Outline planning permission is normally sufficient to establish the extent of development potential. Treasury guidance states that where land has potential for development it should normally be sold with planning permission for the type of development which will maximise sale proceeds. Chapter 32 of “Government Accounting” provides more detailed guidance. Departments, with their advisers, should weigh up the relative costs entailed by possible delay against the potential price increase.

In exceptional cases where, for example, there is doubt about which use would generate the best price, it may be preferable to sell a property without the benefit of planning permission. In these cases Departments should consider including a ‘clawback’ clause in the terms of sale to enable them to recoup some or all of any increased value attributable to a subsequent grant of planning permission. Chapter 32 of “Government Accounting” and a later section of this Chapter provide more detailed guidance.
Departments may also consider entering into a Joint Venture scheme with the purchaser as this may offer the best value from the disposal, especially on very large sites. A Joint Venture scheme is one in which a large site with uncertain development potential is sold in part to a developer who retains options to buy further tranches in the future. The development potential will be realised over a period of time and this disposal method may allow the Department to obtain the best initial price and benefit from the increasing value.

When considering the development of property, regard should be had to the policies in the relevant Development Plan and Departments should liaise with the local planning authority.

Surplus property may lie within areas of sensitive planning control such as the Green Belt or a Conservation Area and/or the property may be statutorily listed. In any of these circumstances, development potential may be significantly affected. The Planning (Listed Buildings and Conservation Areas) Act 1990 Part III contains special provisions for obtaining listed building or conservation area consents in respect of surplus Government property.

Departments should be cautious about attempting to obtain planning permission, prior to disposal, for any development that might be contrary or prejudicial to national planning policies.

What should you do?

1. Consult, and refer property advisers to, relevant sections of “Government Accounting” Chapter 32 and SO Circular 21/84.

2. Instruct property advisers to research planning history and circumstances, and consider obtaining a beneficial planning consent.

3. In exceptional cases where unusual delays or costs are likely to be involved in planning permission, consideration should be given to selling the land to a purchaser who has entered into a clawback agreement. Legal and property advice should be sought in such instances.
Historic Buildings

The disposal of historic buildings and sites should be handled carefully if Government policies regarding their protection and conservation are to be complied with.

The criteria upon which decisions are made regarding the disposal of historic buildings and sites are different from those used in other disposals. Departments should have regard to the “The Disposal of Historic buildings - Guidance Note for Government Departments and Non-Departmental Public Bodies” and “Government Accounting” Chapter 32.


Key Points

The key points to consider in disposals are:

- Before deciding to vacate an historic building, the feasibility of adaptation and alternative use should be considered. Most older buildings, with sensitive adaptation, can give long-term cost-effective service. In making financial assessments of alternative options, full account should be taken of the costs of responsible disposal, including any potential costs and risks incurred in maintaining and protecting the building if it becomes vacant.

- All surplus historic buildings - and particularly those which are vacant or only partially used- should be disposed of expeditiously. This may point to particular methods of disposal.

- Methods of disposal other than open market sale by auction or competitive tender may need to be considered, where these will increase the chances of securing appropriate ownership and use of historic buildings;

- In cases of town planning uncertainty, Departments should ensure that they assess any potential for realisation of development value by a purchaser, and safeguard the taxpayer’s interest by use of clawback, covenants or other means, where appropriate.
• Sites containing groups of historic buildings should be considered individually and as a whole. Buildings can be sold individually, but they may also need to be marketed as a single development package in order to avoid isolating historic elements of the site and potential damage to their setting.

• In cases involving large or complex sites, their disposal should be informed by an authoritative and independent analysis of their heritage significance, together with a full market and financial analysis.

• Maximisation of receipts should not be the overriding aim in cases involving the disposal of historic buildings. The aim should be to obtain the best return for the taxpayer that is consistent with Government policies for the protection of historic buildings and areas. These policies are likely to limit opportunities for the realisation of development value.

• Appropriate professional advice should always be taken on the disposal of historic buildings, from advisers with proven experience.

• Early consultation with all interested parties will assist in overcoming any difficult or controversial issues.

What are ‘Historic Buildings’?

For the purposes of this Guide Historic Buildings include:

• listed buildings; and

• scheduled ancient monuments.

There are also other types of built heritage which do not benefit from statutory designation, but where their preservation may be a material consideration in the determination of a planning application. These include:

• unlisted buildings which make a positive contribution to the character or appearance of designated Conservation Areas;

• locally listed buildings, where policies for their protection have been formally adopted by the local planning authority;

• unscheduled monuments including important archaeological remains; and

• historic parks and gardens where these are included in Historic Scotland’s and Scottish Natural Heritage’s Inventory of Historic Gardens and Designed Landscapes in Scotland.

The “Guidance Note” gives further details of the categories of buildings and other structures covered.
Policy Framework

Government policy for historic buildings and areas set out in DOE/DNH Planning Policy Guidance Note 15 (PPG15) (1994). These documents state that there is a general presumption in favour of the preservation of listed buildings and buildings which make a positive contribution to the character or appearance of conservation areas. Consent for demolition of listed buildings is given only in very exceptional circumstances, and disposal strategies should not be based on the assumption that it will be forthcoming. It is reasonable for disposing Departments to explore the possibilities for adapting or altering a building to suit an economically viable use, but these must be carried out without unacceptable damage to the building’s special character. In general, the normal planning policies on changes of use will apply to historic buildings. Government planning policy recognises that the best way of securing the upkeep of historic buildings and areas is to keep them in active use.

Methods of Disposal and Price

Detailed guidance on appropriate methods of disposal for historic buildings is given in the “Guidance Note” referred to above and in “Government Accounting”. Later sections of this Guide also give information and general advice about disposal methods which will provide useful background.

Departments should pay particular attention to the possible need for packaging disposals of groups of buildings, and drawing up a suitable planning strategy. To do this Departments will need to use appropriate specialist consultants and liaise closely with the local authority and other relevant bodies such as Historic Scotland. Where large and/or sensitive sites are involved it will often be helpful to consult with the relevant Government Office and other key regional agencies.

It is Government policy that maximisation of receipts should not be the overriding objective in heritage disposals.
The Need for Professional Advice

The key to successful re-use or adaptation of historic buildings is financial viability and it is essential therefore, when considering disposal and development projects involving historic buildings, that the professional advisers selected have the appropriate level of knowledge and experience to advise accordingly. PACE can advise and assist in the employment of appropriate professional property advisers. In addition the Government Historic Buildings Advisory Unit (GHBAU) maintains an informal register of specialist conservation consultants and can advise Departments on the identification of appropriate consultants in individual cases.

What should you do?

1. Clarify the status of possible historic buildings before disposal procedures are put in train.

2. Consult the Government Historic Buildings Advisory Unit (GHBAU) and follow the advice contained in “The Disposal of Historic Buildings - Guidance Note for Government Departments and Non-Departmental Public Bodies”.

3. Consult PACE and the GHBAU, and appoint appropriate specialist professional advisers and conservation consultants.
DISP 2.1.4  **Former Owners - “Crichel Down Rules”**

Surplus land, which was originally acquired compulsorily or under threat of compulsion, may need to be offered back to the former owner or the former owners' successors under the Crichel Down rules. These rules were published in SO Circular 21/84 and were updated in advice dated October 1992 in SO Circular 38/92. Further guidance is given in “Government Accounting”. The rules are currently under review.

The general rule is that if Departments wish to dispose of surplus land to which the rules apply, former owners will be given a first opportunity to repurchase the land previously in their ownership, provided that it has not been materially changed in character since acquisition. A material change for example would be a change from agricultural land to housing. Temporary buildings are generally regarded as not a material change.

Disposal to former owners under these arrangements will be at a price reflecting current market value (including any development value), as determined by the Department’s property advisers.

**Observance of these rules is mandatory for Government Departments.**

**What should you do?**

Research the history of the site with advice from property and legal advisers where disposal of land could be affected by the Crichel Down rules.
**Sitting Tenants**

Surplus property earmarked for potential disposal may contain tenants or sub-tenants benefiting from security of tenure. Where their occupation is a small area of an otherwise potentially self-contained property or where they occupy a vital area such as a reception hall, they are likely to make disposal difficult.

**Disposal with vacant possession**

If a suitable package for disposal within the property cannot be created it may be necessary to attempt to negotiate with the tenant for a surrender of its lease(s). Disposals of tenanted property should ideally be timed to coincide with a landlord's lease-break option or with the end of the lease to simplify obtaining vacant possession. This is a complex area and professional advice should be obtained from property and legal advisers at least one year before disposal is planned so that the appropriate action can be taken.

**Disposal with tenants in place**

If vacant possession cannot be obtained, or, if the tenant(s) occupy a large proportion of the property, it may be necessary and preferable to sell the property with a sitting tenant in place. Much surplus Government property is older, poorer quality offices which could be difficult to re-let once they become vacant. The presence of an established tenant could make the property more desirable to potential purchasers because the rent payments cover costs and provide an investment income. A vacant property also deteriorates quickly and thus loses value.

**Strategy**

The presence of sitting tenants should influence the strategy relating to a property and its place within the portfolio. Decisions as to whether to or not to try to regain vacant possession prior to sale should be taken as early as possible. For Crown owned feuhold property the decision should take into account the relative value of the property as an investment or for development. In the case where the Department itself holds a lease from a commercial landlord it may be preferable to surrender the lease to the landlord rather than try to dispose of it to a third party. In these circumstances it is important to consider the landlord's strategy in respect of the property. (See below for further advice).
**Jointly Occupied Buildings**

In the case of buildings occupied jointly with other Government Departments, minor occupiers are not considered to be sitting tenants. The Holder should establish whether it is appropriate to re-locate a Department occupying a small part of a largely vacant building in accordance with the Departmental Estate Occupancy Agreement (DEOA) and the Civil Estate Co-ordination Agreement (CECA). This should be done in liaison with PACE.

In Crown owned feuhold property where the minor occupier wishes to remain in occupation the property can be disposed of to that occupier by means of inter-departmental transfer (see DEOA Chapter 3 and “Government Accounting” Chapter 32). Where the Holder owns a lease which is to be surrendered, the occupier can arrange a new lease directly from the commercial landlord to run from the moment of surrender thus ensuring continued occupation.

**What should you do?**

1. Establish if a suitable area for disposal can be identified with the tenant in place.

2. If not, appoint property and legal advisers to investigate and advise on the options.

3. Discuss with PACE the possibilities for estate rationalisation.

4. Notify any minor occupiers of an intention to vacate in accordance with the DEOA and discuss fully and openly.

5. Take account of overall Exchequer costs in a business case that relies on the relocation of other Government Departments.
FEUHOLD PROPERTY

Feuhold property is owned, not occupied under any lease agreement nor is rent paid to a superior landlord. It may be disposed of by sale or by means of an inter-departmental transfer to another Government Department, or it can be made available to be occupied under lease or MOTO. Under Treasury guidance “Government Accounting” Chapter 32, sale or transfer rather than lease or MOTO should be the rule unless there are strong reasons to the contrary.

The disadvantage of letting the property is that a degree of property management will then be required in terms of rent invoicing, providing services and carrying out rent reviews, for example.

There can, however, be advantages in letting a surplus property if this is done as part of the disposal strategy. Where the property is likely to be difficult to sell with vacant possession because of poor demand, its saleability can be improved by creating a lease. In these cases the lease improves the value of the property as an investment, covers at least some of the costs until a sale is achieved and stops the property from deteriorating. It is important to take advice from property and legal advisers at all stages to ensure that leasing is the best option and that the proposed lease will enhance rather than diminish the value of the property.

Both feuhold sale and letting will relieve Departments from CILO/Rates (providing the rent in the lease is exclusive of rates) thus divesting of a major liability.

In some instances, Departments will want to dispose of feuhold property where it has already agreed leases with commercial tenants, or MOTOs with other Government Departments. After taking proper professional advice, the Department should decide whether to seek to regain vacant possession prior to disposal.

Departments wishing to dispose of feuhold property should consult with PACE and consider the potential for Exchequer savings by including the property in a wider rationalisation scheme.

What should you do?

1. Liaise with PACE on the rationalisation options.

2. Take advice from property and legal advisers as to the best strategy for disposal of feuhold property.
LEASEHOLD PROPERTY

Before attempting to dispose of property held on a lease it is essential to consider and weigh up all the alternatives. Advice should be taken from PACE as to the possibility of achieving disposal through re-use by another Government Department, or as part of a rationalisation scheme which would create wider Exchequer savings. Property and legal advisers should also be consulted to give advice on the options.

There are several ways of disposing of a leasehold interest:

- at lease break;
- at expiry;
- by assignation;
- by surrender to the landlord;
- by purchase and ‘marriage’ of the feuhold and leasehold interests prior to disposal;
- by joint disposal venture with the landlord.

When considering the options it is essential for property advisers to have a good understanding of the property, the market and the positions of the various interested parties.

What should you do?

1. Employ appropriately qualified, experienced property advisers who are knowledgeable about your type of property and the market in which it falls.

2. Liaise with PACE to consider re-use and rationalisation options.

3. Be prepared to consider creative and imaginative solutions to disposal problems.
Lease Breaks

Where a lease has negative value (i.e., the rent is above market value) exercising a break may be the best method for Departments to dispose of a leasehold interest. Provided a break clause is exercised correctly and there are no severe rental penalties, it is possible to vacate a property with no further liabilities. It should be remembered that, unless contractually excluded, operation of a break-clause will trigger a dilapidations liability and Departments should take this into account when considering this option. In the case of a jointly occupied property, the Holder should refer to the Departmental Estate Occupancy Agreement (DEOA) for guidance on exercising breaks. Even where a break is possible Departments should consider the rationalisation option and liaise with PACE since re-use by another Government Department may provide best value.

Where a lease has positive value (i.e. in a rising rental market) a surrender is likely to be the best method of disposal.

To reiterate the cautions on the exercise of breaks, notices and notice periods will need to be complied with under the lease. This might require two notices served at different times. There may also be conditions to breaking the lease such as full compliance with lease covenants (potentially extremely onerous) and/or a rental penalty. Successful operation of a break is not a certainty.

What should you do?

1. Take advice from property advisers as to whether to exercise a break.
2. Liaise with PACE and consider re-use/rationalisation options.
3. Take advice from legal and property advisers to ensure that all notices, notice periods and conditions are complied with.
4. In jointly occupied buildings, ensure compliance with the DEOA when exercising lease breaks.
**Assignation**

Assignation is the transfer of the whole leasehold interest to another party. Where a Department assigns its lease the new tenant will be responsible for all the covenants. In a strong market, where the passing rent is below the market rent and there is a significant time until the next rent review, a premium can be charged to a new tenant (assignee) for the benefit of the lease. Conversely, where the rent is higher than the market level, or the lease terms are particularly onerous, it will be necessary to offer an inducement to any incoming assignee. It should be noted that, if an assignor’s landlord has elected to charge VAT, premiums are a taxable supply and are standard rated for VAT.

Care should be taken with leases containing a provision to make tenants jointly and severally liable with their successors and future assignees for the performance of their leasehold obligations.

Because there is no privity of contract in leases in Scotland, it is likely that the tenants will have either have to ensure assignees are of equivalent financial status or provide a guarantee, in which case a potential liability will remain.

In the case of multi-occupied property it is often possible to find a ‘special purchaser’ from amongst the other occupiers. The ‘special purchaser’ will have a special reason for wanting to take an assignment and will therefore be likely to be willing to pay the best price.

**What should you do?**

1. Try to identify a ‘special purchaser’.
2. Always thoroughly investigate the financial standing of any assignee and their ability to meet lease demands throughout the term.
3. Ensure that the property advisers appointed to dispose of the lease have addressed the VAT implications where there is a reverse premium.
4. In negotiating a premium the property advisers will need to take into account any potential dilapidation liability.
Surrender

It may be possible to negotiate a surrender of a lease if there is no break in the near future. This will be more attractive to a landlord in a strong market where it will be easy to re-let at a higher rent. However, in a poor market in which it will prove hard to re-let, a landlord is unlikely to agree to a surrender without suitable financial compensation.

A surrender premium should be explicitly in full and final settlement of all further liability under the lease and thus any dilapidations liability will need to be assessed and addressed. Landlords are under no obligation to agree to a surrender and therefore surrender premiums can be several times the annual rental when the prospects of re-letting the premises to a financially secure tenant are slim.

Departments should consider subletting on the best terms they can achieve, or entering into a Memorandum of Terms of Occupation (MOTO)/lease agreement with another Government Department prior to negotiating a surrender. (The other Department should be made fully aware of intentions and be agreeable.) This will assure a rental income for a landlord who is anxious to maintain the investment value of the property. Landlords who wish to redevelop, or who are confident of re-letting may prefer a vacant building.

Where a Department has difficulty in making a capital payment for surrender, it may be attractive to both parties for the Department to continue with a series of annual payments instead. Advice from property advisers would be required to negotiate the correct level of payments.

What should you do?

1. Surrender premiums may attract VAT at the standard rate and the advice of property/legal advisers should be sought.

2. The negotiating position of the landlord should be considered and understood by property advisers.
‘Marriage’ of interests

The concept of ‘marriage value’ is important when considering leasehold disposal options. Where a landlord accepts a surrender of a lease and is willing to pay a premium it is because the feuhold interest is worth more when there is vacant possession than it is subject to the lease. This is not always the case, but, where the rent is below market value, or where the property has development potential it is likely that there will be value to be gained from the ‘marriage’ of the two interests. Departments should be aware of the ‘marriage value’ when agreeing surrender terms with the landlord.

However, it may be possible for the leaseholder to acquire the feuhold or headlease interest from the landlord prior to disposal, thus ‘marrying’ the two interests. This option requires a greater investment of resources than other options, but it also offers flexibility and, ultimately, better returns if the property is skillfully managed and disposed of.

Alternatively, the landlord might agree to a joint disposal programme in which both interests are marketed and disposed of at the same time. This would enable a purchaser to ‘marry’ the interests. The ‘marriage value’ could then be shared between both parties.

What should you do?

1. Ensure that your property advisers are alert to the potential of ‘marriage value’ and consider all the options.

2. Be prepared to be imaginative in creating disposal solutions.
Sub-Letting

Sub-letting without an exit strategy should be regarded as a last resort to limit the Department's property liability and is not a recommended method of disposal by Treasury. Sub-letting is essentially the creation of a lesser leasehold interest to another tenant (the sub-tenant) to whom the Department is then the landlord. The Department remains liable for all its covenants under the headlease and at the same time it must collect rent and generally manage the sub-letting.

Sub-letting as part of an exit strategy can be an extremely valuable and useful tool in achieving disposal at best value.

It should be remembered that most office property is held by landlords as investments based on the rental return they produce. If a Department wishes to dispose of its leasehold interest before the end of the lease then it will often be beneficial to protect the landlord's investment by providing for an alternative source of rental income. Sub-letting is therefore likely to figure highly when considering alternative disposal strategies.

What should you do?

1. **Sub-letting should only be considered as part of a disposal strategy. It is not recommended for Departments to become long term head lessees in property that is surplus to their own business requirements.**

2. Ensure that the appointed legal advisers address issues of security of tenure and dilapidations where necessary.
DISP 3.0  SALE OPTIONS

DISP 3.1  METHODS OF SALE

DISP 3.1.1  General

When all avenues for re-use of a property by another Government Department have been explored and it is clear that there is no demand for the property within Government it should be placed on the open market for sale as soon as reasonably possible. Treasury guidance states that disposal should take place within three years of the property being declared surplus in most cases. Occasionally there will be special circumstances where a longer period is justified. Each case should be considered on its merits.

Where a disposal on the open market is contemplated, the method of sale, the price and the main contract issues (the Heads of Terms) will be matters to be decided with the benefit of appropriate property advice. In every case it is vital when following the guidance of “Government Accounting” that the maximum exposure is given to market competition.

The method selected will depend, inter alia, on the nature of the property and the strength of the market at the time of sale. The principal methods are:

- private treaty;
- informal tender;
- formal tender; and
- public auction.

The aim in marketing public assets should always be to generate and maintain the maximum amount of interest in the property and in this connection it should be noted that it may be possible to use one or more of the above methods of marketing in connection with the disposal of a property.

Annex 32.1 to “Government Accounting” Chapter 32 provides useful and more detailed advice on subjects such as value and price, methods of sale and the use of professional agents and valuers.
Departments should be aware that property investment is a prime target for money launderers and that anyone knowingly dealing with or receiving illegal funds is liable for up to 14 years in prison and an unlimited fine. Departments should therefore ensure that their property advisers adopt best practice procedures to satisfy themselves as to the identities and bona fides of prospective purchasers.

What should you do?

1. Liaise with PACE to determine that there is no demand for the property from within Government before seeking to dispose of it on the open market.


3. Instruct a selling agent as suggested above. This agent should advise on the value, the most suitable method of sale and on the acceptability of the terms of offers/bids and sources of funding available to the purchaser.

4. Ensure that throughout the campaign the selling agent uses all opportunities to generate and maintain interest from the market.

5. Ensure that property and legal advisers are aware of and adopt best practice procedures to satisfy themselves as to the identities and bona fides of any prospective purchasers.

6. Remember that as a result of The Requirements of Writing (Scotland) Act 1995, a contract may be created unintentionally by an exchange of letters. Care should therefore be taken to ensure correspondence or verbal statements are not deemed to form part of a contract.
**Private Treaty**

The majority of private houses are sold by private treaty, but many other types of property are also sold in essentially the same way. The main characteristics of a sale by private treaty are:

- there is no fixed timescale for completion of the transaction;
- offers are made 'subject to conclusion of missives';
- offers are not all received at the same time; and
- it is usual for the price to be quoted.

Departments should ensure that throughout the marketing process the property is fully exposed to all potential purchasers.

There is therefore the potential for private treaty negotiations to extend over a considerable period of time, either because the purchaser has valid concerns regarding the physical nature of the property or its legal status or for other reasons, for example, that the purchaser is also interested in another property.

The drawback of a private treaty sale for a vendor is that negotiations can extend over a considerable period of time and the purchaser can pull out of the negotiations at any point during that process prior to a contract being concluded. This is a procedure rarely used in Scotland.

Treasury guidance in “Government Accounting” states that apart from houses, sale by private treaty should be exceptional. An example would be where a sitting tenant expresses an interest in purchasing the property and is prepared to pay more than the market value. In this instance a suitably qualified valuer should give written assurance that the price offered is higher than the market value. In very rare cases a concessionary sale may be made to a heritage body (such as the National Trust). In such cases the Department’s Accounting Officer and the Minister should be prepared to defend the sale, and Treasury approval should be sought. “Government Accounting” gives advice about how to treat sales of property at below market value.

**What should you do?**

(see over)
What should you do?

1. Seek the advice of a suitably qualified valuer on value where a decision has been made to sell by private treaty. Other than in high value or complex cases the valuer may also be the selling agent and property adviser, provided they have appropriate expertise.

2. Bidders credit worthiness and source(s) of finance should be thoroughly checked prior to accepting any bids.
Informal Tender

An informal tender is similar to a private treaty sale, but with this method of disposal one of the disadvantages of a private treaty sale is overcome, i.e., the fact that bids may be received at different times and on different bases. With an informal tender, the property is marketed for a set period of time, and at the end of that time the marketing is drawn to a close by a best offers due, thus ensuring that all the offers are received at the same time on a comparable basis.

This enables the vendor to look at a number of bids simultaneously and make a judgement as to which bid to accept. The vendor is not usually obliged to accept the highest, or any, bid.

Offers received will, however, still require missives to be concluded and there is the risk that even where an offer is accepted a sale may not complete. However, provided that a number of offers are received, there will be an element of competition, which is of assistance to the vendor in subsequent negotiations.

There is a risk that once an offer is accepted the bidder may use his/her favoured position to negotiate changes in the terms of sale or a reduction in the price. In this situation the vendor may reconsider the other bids. The vendor should keep the underbidders interested so that a strong negotiating position is maintained. Informal tenders frequently result in sale to one of the underbidders after higher bidders drop out. When deciding whether to accept an offer the vendor should consider the willingness and ability of the bidder to complete the sale.

Informal tenders encourage prospective bidders to make bids since they know that any offer made remains ‘subject to conclusion of missives’ and there is therefore less risk for them. They are most commonly used where there are elements of uncertainty relating to the disposal, or where the market is not particularly strong.

If a higher offer is received after the best and final offers date it should not be ruled out, even if a lower offer has been accepted subject to conclusion of missives. In this instance property and legal advice should be sought.

What should you do?

(see over)
What should you do?

1. Seek the advice of property advisers on the merits of the bids received.

2. Seek property and legal advice where a higher offer is received after the best offers date.

3. Bidders credit worthiness and source(s) of finance should be thoroughly checked prior to accepting any bids.
DISP 3.1.4  
**Formal Tender**

In a formal tender the ‘Conditions of Sale’ are sent out with the sales information and prospective purchasers have to return the entire document, including the conditions of sale, signed and enclosing a deposit cheque. The vendor then normally has a set period within which to make a decision on the bids received. When a bid is accepted, however, and the deposit cheque banked, a contract has been concluded.

From the vendor’s point of view therefore, a formal tender has the great advantage of certainty. It does, however, have a number of disadvantages. Prospective purchasers are aware that if they submit an offer enclosing a deposit cheque, there is a chance that their offer will be accepted and that their deposit cheque will be cashed. They will therefore have to carry out detailed investigations into the property prior to submitting an offer without knowing whether they have any real chance of acquiring the property. Such tenders can therefore be very time consuming and expensive for the purchaser, and the number of bids likely to be received will generally be less than if a property was offered by way of informal tender or private treaty. This method of sale is not recommended for use in a weak market, or where there are elements of uncertainty in relation to any aspect of the sale package.

In practice, this procedure is rarely used in Scotland.

In a formal tender it will usually be appropriate to set a closing date and time before which bids should be received. Bids received late should not be considered. Departments should take professional advice about how to proceed.

**What should you do?**

1. Property and legal advisers should draw up the ‘Conditions of Sale’ and tender documents.

2. The selling agent/property adviser should advise on the reserve price and this should be set as close as possible to the appropriate date.

3. The property should usually be sold to the highest bid above the reserve, although consideration should still be given to lower bids.

4. If the highest bid only marginally fails to clear the reserve price, then advice should be sought from the property adviser (and any independent valuer, on large sales) as to whether it should be accepted.

5. Bidders’ credit worthiness and source(s) of finance should be thoroughly checked prior to accepting any bids.
Under Treasury guidance for the disposal of surplus property, public auction is one of the preferred methods of sale. This is because it is usually quick, certain and demonstrably fair. This method does, however, have some disadvantages and should be used with care. Auctions will not achieve the best price if there is insufficient interest or competition within the saleroom on the day. This method of sale may not allow potential purchasers to carry out sufficient investigations prior to sale and they are therefore more likely to be cautious in their bids. Failure to sell a property at auction can have a blighting effect on the property and some potential purchasers dislike auctions and will not therefore bid. Auctions can also be expensive. Public auctions are best suited to disposals of small, commonplace investment properties such as tenanted houses or high profile disposals where there is sufficient interest generated to draw a large number of serious potential purchasers.

Conditions of sale are published with the auction prospectus and it is vital that the appointed selling agents sufficiently advertise the auction and that the property has sufficient exposure to the market. The auction prospectus must be as accurate as possible as a sale following incorrect auction particulars or misstatements may lead to a recession or price abatement if the purchaser litigates. Departments and advisers may decide upon a guide price to assist potential purchasers. This should not be confused with the reserve price which is confidential between seller and auctioneer.

The selling agent/property adviser should indicate whether there should be a reserve price on the property. If there is to be a reserve price this should be set close to the time of the auction. If a bid is accepted during the auction then the prospective purchaser must lodge a deposit cheque at the time. Completion follows according to the conditions of the sale issued with the auction prospectus.

**What should you do?**

1. Satisfy yourself that auction is the best method of sale under the circumstances.
2. Ensure that selling agents/property advisers advertise the auction and advise on reserve price.
3. Ensure with the selling agents/property advisers that auction particulars are accurate.
4. Instruct legal advisers to draw up conditions of sale.
SHARING IN DEVELOPMENT VALUE

Introduction

As a general rule sale contracts should be kept as simple as possible. This will keep the costs of negotiating a sale to a minimum and there will be less risk of putting off purchasers through the inclusion of complex contract terms.

Departments may, however, from time to time be under pressure to make early disposals of property. Such pressure may make it necessary to consider disposal in situations where there is a lack of clarity in relation to future development potential, and/or in poor market conditions where the competitive element is reduced.

Treasury guidance states that where land has potential for development it should normally be sold with planning permission for the type of development that will maximise sale proceeds. However, the planning process is risky, costly and uncertain. Departments may therefore decide in certain circumstances to sell a property without obtaining planning permission, especially where the possible future gain is relatively small.

In the above circumstances Departments should consider the need to protect their position in order to be able to demonstrate that, looking at the costs, risks and timeliness of the transaction as a whole, best value has still been obtained for the public purse. Having done so there will be certain circumstances in which Departments will wish to put measures in place to share in any subsequent increase in development value in order to satisfy the requirements of public accountability. The following sections outline some of the main ways in which this can be achieved.

It should be remembered, however, that where a property has been properly marketed, even without the benefit of fully resolved planning, the best price at which missives can be concluded may represent full value, such that any attempt by a Department to seek an additional share in future development value is not appropriate.
Conditional Missives

In some cases, completion of the sale of a property may be dependent on certain conditions being met, e.g., the grant of planning consent. Two of the commonest ways of dealing with this situation are conditional missives and options.

Conditional missives do not become binding until some event takes place (‘conditions precedent’), or alternatively are terminated on the occurrence of some event (‘conditions subsequent’).

Offers which are made for a property ‘subject to conclusion of missives’ may also be subject to planning consent, soil survey, site survey, etc. This means that completion of the sale will be conditional on resolution of the issue(s) of particular concern. For example, if the missives are conditional on planning, the sale will not proceed until a satisfactory consent has been granted.

The inherent problem of a conditional missives for the vendor is what happens when a condition is not satisfactorily resolved from the point of view of the purchaser (for example where the planning consent which eventually emerges is subject to unacceptable conditions). In such circumstances, which may be some considerable time after the contract has been completed, the purchaser may not proceed at all. Alternatively, he may proceed, but wish to adjust the terms, including the price, to reflect the problems which have arisen.

Missives may specifically allow for the purchaser to withdraw or for adjustments to the terms to be made. However, negotiations can become very complex and time consuming in relation to such provisions, particularly where the transaction itself is complex.

Departments should, if possible, avoid situations where conditional missives may be required. As much work as possible should be done prior to disposal to minimise the extent of the conditions. For example, planning permission should be obtained prior to a disposal. Wherever possible an unconditional bid should be favoured over a conditional one.
Options

An option is the right of one or both parties to a contract, if they so wish and if the circumstances are covered by the terms of the contract, to exercise a right to do something or require the other party to do something in the future.

Options are commonly used by landowners where land does not have planning consent and they lack the resources to obtain a consent, but where there is some hope that at some stage in the future, such a consent will be forthcoming.

The purchaser would normally undertake to obtain planning permission in return for some discount on the market value of the land. Such an option might therefore set out the acreage of the land concerned, the length of the option period, the price at which the option could be exercised and who would be responsible for the costs of obtaining planning consent and, if successful, installing the infrastructure for the site. In some cases the purchaser may make an initial payment to the vendor to reflect the fact that the purchaser has been given an exclusive opportunity for a given period of time within which to gain planning consent.

Departments are warned that in granting an option they will lose control of the planning and disposal process for as long as the option exists. Since the Crown does not, generally, lack the resources to clarify the planning position on a property itself the need for an option should be avoided wherever possible, for example by obtaining planning permission prior to disposing of the property.

There are other types of options which may, however, be of use to the selling Department. For example, Departments could agree an option to purchase all or part of a new building on the site on pre-agreed terms. This could be beneficial in enabling acquisition without competition in the market, and in revealing the purchasing developers expectations as to value. This last can be useful in informing negotiations about overage. Departments should take advice from their property advisers.

What should you do?

Seek the advice of property and legal advisers where an option agreement is being considered.
**DISP 3.2.4** 

**Overage/Clawback**

As stated above, sale contracts should as a general rule be kept as simple as possible. However, Departments may be advised in certain circumstances that a property is (for whatever reason) not being sold with the benefit of the best planning permission reasonably obtainable, or that market conditions or other factors are such that it would be appropriate for the Department to share in development profit. In such situations the principal contractual mechanisms used to seek to recoup either all or a proportion of such potential increases in value are known as ‘overage’ or ‘clawback’ clauses. These terms tend to be used interchangeably, but the definitions set out below may be helpful.

- ‘Overage’ is the term used for claiming back an element of improved development value where, for example, there is a general uplift in the market, or where the market value of the end development is not known at the time of sale.

- ‘Clawback’ is used to refer to claims for all or part of windfall gains resulting from, for example, the purchaser obtaining planning permission for a change of use, or a greater volume of development than anticipated by the planning permission obtained prior to disposal.

The need for such mechanisms largely arose from the situation pre 1984 where public authorities were disposing of land, but were unable to secure planning permission prior to disposal. Although this is no longer the case, it may still be appropriate to consider the use of such legal mechanisms. Examples might include: where it is difficult to gauge the commercial potential of a property that has been used for a purpose peculiar to the public sector; where a retailer may have a better chance of obtaining consent for a supermarket than the Department; or, in sensitive areas, where the attempt to obtain planning permission for development would be prejudicial to national planning policy.

Overage/Clawback provisions are, however, difficult to enforce in terms of monitoring the value of the property when it no longer belongs to the Department, establishing the increase in value due to the agreed event, and ensuring that payment of the uplift is protected. In general, therefore, the need for such provisions should be avoided.
There are contractual and other devices that can be used to attempt to enforce payment of the uplift in value. However, Overage/Clawback clauses give rise to an extremely complex set of legal issues and property and legal advice should be sought at the outset on the advantages and disadvantages of the potential courses of action if the use of a clawback/overage agreement is unavoidable. This should include an assessment of the affect of an overage/clawback clause on the sale price.

What should you do?

1. Make preparations prior to marketing the property that will draw out the full development value in the sale price making an overage clause unnecessary.

2. If it is thought necessary to include Overage/Clawback clauses in an agreement, legal and property advice should be taken on the substance and the drafting of such clauses and the likely effect on sale price. The intention to apply clawback should be made plain in sales particulars.

3. Experience suggests that selection of a purchaser is particularly important where clawback is envisaged since, whatever contractual provisions are put in place, good faith on the part of the purchaser will be a necessary factor in ensuring that Departments do ultimately share in development value.

4. The legal advisers should register clawback clauses as land charges.
Works in Lieu of Payment

Where a vendor is disposing of property as part of a rationalisation exercise, it may be that smaller replacement facilities are required or that other works such as new buildings, new highways, landscaping etc. are needed as a part of an improvement exercise. In this case, it is possible to require a purchaser to provide these works as part consideration for the property.

Any proposed works in lieu of payment should be thoroughly examined at the option appraisal stage to ensure the maximum value for money for the taxpayer. The works required should also be clearly specified in any marketing package in order that there is competition between bidders in relation to procurement of these works.

What should you do?

Where works in lieu of payment are being considered as part of a disposal/rationalisation exercise seek advice from property advisers.
CONCLUSION OF A CONTRACT AND SETTLEMENT

Following agreement of the terms of the missives the contract is concluded by the Legal Advisers and at that state becomes binding on both parties.

In the case of feuhold disposals there is often a delay between completion of a contract and settlement, normally 14 to 28 days, to allow the conveyancing to be completed. However, in relation to a leasehold disposal, settlement often occurs contemporaneously with conclusion missives with execution of the lease by both parties shortly thereafter.

Upon settlement of a feuhold sale the purchase price is payable by the purchaser. In the case of completion of a lease a first rental payment is also made provided the rent is paid in advance and there is no rent free period at the commencement.

What should you do?

1. Ensure that property and legal advisers maintain the momentum throughout the conclusion process.

2. Ensure that the negotiating position is maintained, preferably in accordance with a pre-determined negotiating strategy.

3. Obtain a copy of the completed documents from legal advisers as soon as possible after conclusion.

4. Enter the information in respect of the transaction in the estate record system and inform PACE in accordance with the CECA.

5. Conform with departmental policy in respect of the storage of original legal documents. PACE CAU can provide a note on this entitled “Guidance on the Management and Care of Original Documents - Deeds and Sealing”.
GLOSSARY

We recommend you also refer to the Acronyms at INTRO 1.3 of the Guide

**Acquisition**

The search for, investigation, identification and acquisition of premises, or development opportunities to meet requirements. It also involves making any planning enquiries, applications and appeals to the local authority, the negotiation of terms, the commissioning of structural or condition surveys, and instructing solicitors for conveyancing.

**Adverse Possession**

Possession of land other than by consent, force, intimidation or clandestine means, against the claim of another party. After 'unlawful' unchallenged, undisturbed, exclusive occupation of the land for a specific period (defined in the Limitations Act 1980) the occupier may gain title against the 'legal' owner who loses the right to recover possession. 12 years is normally required. However, 30 years is the minimum time required to obtain title by adverse possession against the Crown. NB Compulsory purchase counts as 'force' so that no period of occupation following the use of compulsory powers can give the acquiring authority title to the land occupied. If the land occupied is the subject of a lease, occupation can lead only to the acquisition of title to the lease and not the freehold.

**Alienation**

The transfer of an interest in property to another through sale, assignation or sub-letting.

**Alterations**

Physical changes to a property, which may or may not constitute an improvement.

**Appraisal**

The process of defining objectives, examining options and weighing up costs and benefits, uncertainties and risks, before a decision is made.

**Arbiter**

An impartial person who is appointed to settle a dispute in accordance with the Arbitration Acts. (See also Independent Expert)

**Arrear**

Generally found in relation to rent being payable in arrear (ie payable on the last day of the period to which it relates.)
**Asset**
Anything which is of value - eg land, buildings, chattels, book debts, goodwill.

**Assignation**
The transfer of a tenant's entire leasehold interest in a property to another party.

**Auction**
A method used to sell property to the highest bidder provided the bid is at least the reserve price, if any. Acceptance of the bid creates a legally binding contract.

**Benchmarking**
An on-going process for monitoring and improving performance. By comparing performance with clear reference points against which relative measurements can be made best practices can be identified, which if adopted should lead to continuous improvement.

**Blight Notice**
These can be served by owner-occupiers of land, where the value of the land has decreased substantially as a direct result of published proposals of a public authority's development plan. This could also apply where owners are unable to sell their land or obtain planning permission as a result of published proposals. If proven the authority will be required to purchase the holding at a value which disregards the blight.

**Boundary**
The line which separates ownership of a property from its adjoining neighbour.

**Break Clause**
A clause contained in a lease, giving the landlord and/or tenant a right to terminate the lease prior to its stated expiry date, in specified circumstances. (See also Lease Break Clause)

**BREEAM**
Building Research Establishment Environmental Assessment Method. A method of assessing the 'green-ness' of a building. BREEAM Assessments should be undertaken when planning all new and substantially refurbished premises. These should be regularly reassessed under the BREEAM existing office update scheme.

**Brownfield Site**
An area of derelict, unused or under-used urban land with redevelopment potential. These sites are targeted for redevelopment to encourage urban regeneration following Government led discouragement of developments on out-of-town and greenfield sites. (See also Green Belt)
Business Tenancy

A tenancy held by the occupier of premises used for business, including a trade, profession or employment and (in the case of a body of persons) an activity. Business includes the business of Government.

Capital Charging

An accounting procedure based on the ‘asset value’ or ‘value in existing use’ of property. Used in order to allow Departments to bring into their accounts the value of the property they own and use.

CILOR

The Crown is exempt from rates, however, instead it pays a Contribution in Lieu of Rates (CILOR). These are based on a rateable value set by the Valuation Office Agency (VOA). The amount payable is calculated using the Uniform Business Rate (UBR) multiplier reflecting any transitional or concessionary effects. The amount payable is equivalent to conventional business rates. CILOR will cease with effect from 1 April 2000, when Crown occupiers will become liable for rates on their property.

CECA

Civil Estate Co-Ordination Agreement. This agreement sets out the procedures to be followed by PACE and Departments in co-ordinating activity in the property market and in co-ordinating rationalisation of Civil Estate property.

Civil Estate

Predominately the commercial estate owned or leased by Government (usually held in the name of the Secretary of State for the Environment, Transport and the Regions and the Scottish Ministers) and the First Minister in Scotland to provide accommodation for Government Departments/Agencies. It excludes accommodation on the Government’s other main estates - the Defence Estate, the Diplomatic Estate Overseas, the Prisons Estate, the NHS Estate - and various small specialist estates held in the names of specified Ministers.

Clawback

The recovery of part or all of windfall gains resulting from, for example, the purchaser obtaining planning permission for a change of use, or a greater volume of development than anticipated by the planning permission obtained prior to disposal. (See also Overage)
Comptroller and Auditor General

The head of the National Audit Office, appointed by the Crown, and an Officer of the House of Commons. The Comptroller’s duties are to authorise the issue by the Treasury of public funds from the Consolidated Fund and National Loans Fund to Departments and others: the Auditor general certifies the accounts of all Departments and some other public bodies, and carries out value for money examinations.

Compulsory Purchase

The compulsory acquisition, under statutory powers, of land or buildings by an authorised body in return for compensation.

Computer Aided Design (CAD)

A computer system which enables designs to be created and manipulated on screen, and which can be used as an aid to assist with layout planning or alterations.

Condition Precedent

A detail in a contract that specifies a condition which must be carried out prior to the contract becoming binding.

Condition Subsequent

A detail in a contract specifying that the contract will come to an end should certain circumstances occur or not occur.

Conservation

Action designed to secure the survival or preservation, especially for future use, of buildings, artefacts, natural resources, energy, or anything of acknowledged value.

Conservation Area

An area of special architectural or historic interest designated by the local planning authority, the character or appearance of which it is desirable to preserve or enhance.

Crichel Down Rules

Rules under which (now) surplus land, which was originally acquired either under threat of or by compulsory purchase, is offered back to the original owners (or owners successors) for first refusal. These rules apply if the land has not been materially changed in character since acquisition. (These rules are currently under review by the DETR).

Crown Bodies

All Government Departments, including Executive Agencies and Government Trading Funds set up under the Government Trading Funds Act 1973. NDPBs and public corporations are normally deemed non-Crown, unless otherwise designated by Statute.
**Crown Properties**
Properties in which an interest belongs to the monarch, or is owned by a Department.

**Deed**
A document under seal. This is binding on the parties even if there is no consideration. Certain transactions require a deed (e.g., conveyances).

**DEOA**
Departmental Estate Occupation Agreement for Crown Bodies. This Agreement sets out general arrangements for shared occupation by Departments in general purpose office properties. It is contained in Treasury Guidance DAO (GEN) 1/96. The DEOA contains the fall-back terms and conditions for joint occupation in a jointly occupied building (JOB) where no specific agreement has been reached between Holder and Occupier. The majority of agreements between Crown bodies sharing occupation are based on the DEOA and related MOTO (This Agreement is currently under review by an interdepartmental group). (See also MOTO)

**Departments**
A Department can be defined as a group of civil servants who owe their loyalty to a Cabinet Minister or other Minister in charge of a Department (to whom Schedule 1 of the Ministers of the Crown Act 1975 applies) and who support the Minister in the exercise of his or her statutory and other functions. In addition, certain non-Ministerial Departments are staffed by civil servants in support of the statutory functions of a statutory office-holder or board (e.g., Director General of Fair Trading, Inland Revenue). The use of the word Departments, in the ESG, is taken to include all Government Departments, Executive Agencies and Government Trading Funds.

**Development**
The carrying out of building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of any buildings or other land.

**Dilapidation**
A loss of value of a leased property due to lack of repair through breach of contract by one of the parties to the lease.

**Diligence**
The legal procedure by which a creditor seizes the assets of a debtor either in security of a debt or in implementation of a judgement.
**Disposals**
When a property that is surplus to requirements is **surrendered**, assigned or sold in a relocation or other **rationalisation** process.

**Engrossment**
The final version of a contract/lease, prepared by a legal adviser, following agreement of the final draft between the parties involved. Once signed and exchanged it becomes legally binding on both parties.

**Environmental Impact Assessment**
A requirement for the assessment of the environmental impact of certain **development** projects, usually where a project is likely to have significant effects on the environment by virtue of its nature, size and location.

**Estate Management**
The responsibilities involved in looking after land and buildings within the Estate, including for example, collection of **rent**, providing **services**, and maintenance of the properties. This frequently includes the management of a portfolio of property with the aim of fulfilling strategic goals such as maximising **asset** value and supporting business objectives.

**Evaluation**
Analysis of a project, programme or policy to assess how successful or otherwise it has been, and what lessons can be learnt for the future.

**Facilities Management**
The management of property **assets** and day to day running of the working environment. This can be outsourced to specialist companies, allowing greater focus on core business activities.

**Feuhold**
Where property is owned outright and not occupied under any **lease** or other agreement.

**FRI Lease**
Full Repairing and Insurance Lease. A **lease** where the tenant is responsible for the entire cost of maintaining and insuring the premises, both internal and external.

**GACC**
Guide to the Appointment of Consultants and Contractors. A **PACE** publication providing guidance on procurement in the context of property management. It is intended to encourage the most efficient and cost effective means of engaging consultants and contractors to carry out necessary **services** and works.
Government Accounting

**HM Treasury Guidance** setting out the principles of Government accounting. It covers guidance on accounting systems and operating procedures of common application, which, in the interests of good administration **Departments** are required to take into account in developing their systems. Financial and property matters are closely related, and property managers should be aware of the financial implications of their decisions.

Green Belt

An area of open rural land adjoining an urban area which is defined in a local authorities structure plan, and on which development is discouraged, in order to preserve and maintain the environment and habitats, and help keep urban growth in check. **Green Belt** areas can aid in moving towards sustainable patterns of urban development. (See also **Brownfield Site**)

“Green Book”

Treasury Guidance on “**Appraisal** and **Evaluation** in Central Government”.

Ground Lease

A **lease** for land only and on which a **ground rent** is payable. This is a **rent** paid for the land rather than for any buildings on that land.

Ground Rent

Rent paid for undeveloped land held by a **ground lease** on which a building may now stand.

Heads of Terms

The main issues of an agreement intended to form the basis of a contract.

Historic Buildings

Buildings or other structures which are of architectural or historic importance. These include **listed buildings** and scheduled ancient monuments.

HM Treasury Guidance

States **Departments’** responsibility for the management of the property they occupy and their accountability for the decisions they make, along with general instructions on how these responsibilities should be fulfilled, eg **Government Accounting**, **DAO, TOA** letters. (See also INTRO 1.3 **Acronyms**)

Holder

A Department in a jointly occupied building (**JOB**), usually the one occupying the largest area, which has the interest, either **feuhold** or **leasehold**, entered in its **asset** register and which has agreed **MOTOs** to provide common accommodation services to other Crown occupants of its interest. (See also **Major Occupier** and **Occupier**).
Improvements
Physical changes which normally enhance the capital or rental value of land or buildings including, for example, additional buildings, extensions or installation of new services. Mere replacement by a modern equivalent of something worn out would be regarded as repair rather than improvement. (See also Repair)

Independent Expert
A professional with appropriate specialist knowledge who is appointed to provide a resolution to a dispute. This specialist knowledge is used in addition to evidence presented in order to make an informed decision, which is final and binding on the parties. (See also Arbiter)

Information Notes
Guidance Notes issued by PACE CAU advising recipients of recent publications and information relevant to the management of the Civil Estate.

Intelligent Customer
An Intelligent Customer has the capability to exercise sound judgement in property related matters, and in the appointment and management of professional consultants. In accordance with current HM Treasury Guidance this role must remain either 'in-house' or be obtained as a service from PACE.

IR Lease
Internal Repairing Lease. A lease where the tenant is responsible for internal repairs only.

Irritancy
The procedure by which the landlord is entitled to terminate a lease prematurely because of the tenant’s breach of a term of the lease.

JOB
Jointly occupied buildings. A building in which Crown bodies have agreed to share occupation under the terms of a MOTO. (See also DEOA)

Joint Occupation
Where Departments have arranged to share occupation within a building, under the same commercial lease or Crown feuhold. (See also DEOA)

Lease
A contract for exclusive possession of land or buildings for a fixed and definite duration, for which there is a payment. The main difference between a lease and a licence is that only a lease gives deliberate exclusive possession to the tenant, ie the tenant controls the property and can exclude all other persons from it for the duration of the lease.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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</thead>
<tbody>
<tr>
<td>Lease Break Clause</td>
<td>Clause contained in a lease, giving the landlord and/or tenant a right to terminate the lease prior to its stated expiry date, in specified circumstances. (See also Break Clause)</td>
</tr>
<tr>
<td>Lease Term</td>
<td>The stated duration of a lease.</td>
</tr>
<tr>
<td>Lease Terms</td>
<td>The clauses in a lease which state everything agreed by the parties to govern their contractual responsibilities and commitments under the lease.</td>
</tr>
<tr>
<td>Leasehold</td>
<td>The tenure of an estate held for a term of years, or other specified period.</td>
</tr>
<tr>
<td>Licence</td>
<td>Permission to occupy land. The main difference between a licence and a lease is that only a lease gives deliberate exclusive possession to the tenant. A licence does not confer any legal estate or interest. (See also Lease)</td>
</tr>
<tr>
<td>Listed Building</td>
<td>A building of special architectural or historic interest included in the statutory list by the Secretary of State for Culture Media and Sport.</td>
</tr>
<tr>
<td>Market Rent</td>
<td>The full annual rental value of a property achievable on the open market, on a given set of terms and conditions, also known as Rack Rent. (See also Rack Rent, Rent)</td>
</tr>
<tr>
<td>Market Value</td>
<td>The best price an asset would expect to achieve at sale between a willing buyer and a willing seller on the open market. (See also Open Market Value).</td>
</tr>
<tr>
<td>Major Occupier</td>
<td>The Department in a jointly occupied building (JOB) occupying the largest area. The Major Occupier is usually, but not always, the Holder. (See also Minor Occupier)</td>
</tr>
<tr>
<td>Minor Occupier</td>
<td>A Department in a jointly occupied building (JOB) that is not the Major Occupier. (See also Occupier)</td>
</tr>
<tr>
<td>Missives</td>
<td>The letters of offer and acceptance which constitute a binding contract.</td>
</tr>
<tr>
<td>Modern Lease</td>
<td>Lease providing for rent reviews at intervals of seven years or less.</td>
</tr>
</tbody>
</table>
**MOTO**

Memorandum of Terms of Occupation. A document frequently based on the DEOA, containing a summary of the particular terms applicable in an agreement between Holder and Occupier in a JOB. (See also DEOA)

**NDPB**

Non-Departmental Public Body. These bodies have a role in the processes of Government, but not as a Department or part of one. NDPBs may or may not have landholding powers depending on the terms under which they were created.

**Net Internal Area (NIA)**

The usable internal space of a building as defined by the Royal Institute of Chartered Surveyors (RICS) and the Incorporated Society for Valuers and Auctioneers (ISVA) Code of Measuring Practice. It excludes, for example, toilets, lifts and stairwells.

**Obligation**

An agreement/obligation contained in a lease, which can be positive (ie to do something) or negative (ie not to do something). Obligations can be express or implied.

**Occupier**

A person/body having the right to occupy property, whether or not they physically occupy it. (See also Major Occupier, Minor Occupier and Rateable Occupier). This term is also used specifically in the DEOA to mean a Department in a jointly occupied building (JOB) that is not the Holder. The Occupier will have agreed a MOTO with the Holder to receive accommodation services.

**Open Market Value**

The best price an asset would expect to achieve at sale between a willing buyer and a willing seller on the open market. This term carries a technical definition in relation to valuations, which can be found in the RICS Appraisal and Valuation Manual. (See also Market Value)

**Option**

A right of one or both parties to a contract, if they so wish and if the circumstances are covered by the terms of the contract, to exercise a right to do something or require the other party to do something in the future.

**Overage**

The recovery of a portion of improved development value where, for example, there is a general uplift in the market, or where the market value of the end development is not known at the time of sale. (See also Clawback)
PACE CAU
Property Advisers to the Civil Estate Central Advice Unit. The Central Advice Unit provides guidance and practical help on all property related issues and aims to be its customers’ first choice for advice on all working environment matters. The CAU promotes co-operation between Departments to enable them to obtain best value, and promotes best practice in the management of Government workspace. (See INTRO 1.1)

Passing Rent
Rent actually paid by the occupier for premises in which the occupier is the tenant of a commercial landlord. (See also Rent)

Peppercorn Rent
A token amount payable as rent to a landlord, taking the form of either a nominal amount of money or, historically, a red rose or a peppercorn. (See also Rent)

Planning Agreements
Where planning permission is granted subject to certain agreements or obligations being imposed in addition to planning conditions.

Planning Applications
Where planning permission is required for a development, a planning application must be lodged with the relevant authority. It will include a detailed description and plans of the proposed development.

Planning Conditions
Where planning permission is granted subject to certain conditions being complied with. The planning authority is required to clearly state the full reasons for the imposition of the conditions.

Planning Permission
Approval from a local planning authority for a proposed development, as required by the Town and Country Planning (Scotland) Act 1997.

PMG
Premises Management Guide. A PACE publication written to assist Departments in discharging their day to day responsibilities for the management of their properties. It covers a range of issues with which Departments should be familiar in managing their premises.

Prescribed Term
The duration of a lease term as specified in the lease. This phrase has a specific definition in relation to the DEOA where it relates to the duration of the term of occupation under a MOTO.
Prescription

The acquisition of an easement by virtue of long enjoyment of a right, without the permission of the owner of the land over or in respect of which the right is exercised. Easements acquired by prescription may be referred to as 'prescriptive rights'. The law on the subject is complex, but broadly speaking the enjoyment of a right for a continuous period of 20 years may be sufficient to establish an easement of prescription.

Private Developer Scheme (PDS)

A legal transaction between the Crown and a developer, whereby a developer agrees to construct or refurbish a building (usually offices) to an agreed size and specification. The future occupier has input into the design requirements of the proposal and on completion will take on a lease at a rent and on terms which have been fixed in advance. There will be a genuine transfer of risk to the private sector.

Private Finance

Used in the public sector to describe the supply by the private sector of public services, including the provision of assets and their financing.

Private Finance Initiative

A Government policy initiative designed to increase the role of private sector finance in the provision of public services. In respect of accommodation it is usually where private sector developers, financiers and service providers form a team to provide, maintain and service a building for a particular occupier over a long occupation term, in accordance with pre-agreed requirements. It must offer the genuine transfer of risk to the private sector, along with value for money for any expenditure of public monies.

Private Treaty

The most common method of disposal of property, where negotiations are carried out between the vendor and potential purchaser privately, normally with no fixed timescale for completion of the transaction and conclusion of missives.

Professional Advisers

A skilled adviser who is consulted because of their specialist knowledge and experience in a particular field. Usually possessing a qualification from a professional body they can be expected to give a high standard of care in the advice they offer.

Public Private Partnership (PPP)

See Private Finance Initiative and Private Developer Scheme.
**Public Sector Comparator**
An estimate of what a project would cost if traditional public sector procurement or funding methods were used.

**Rack Rent**
The full annual rental value of a property on a given set of terms and conditions, also referred to as Market Rent. (See also Market Rent, Rent)

**Rateable Occupier**
An occupier who is liable to pay the rates for a property.

**Rateable Value**
The Rateable Value is the estimated rent that the property would be likely to fetch on the open market at a specific date taking into account the present day physical circumstances of the property and a given set of standard terms and assumptions. It is the basis of the calculation of rates. This term has a statutory definition which is set out in the Local Government Finance Act 1988.

**Rates**
A form of tax for occupation of land or buildings, which vary with any annual changes in the Uniform Business Rate, and which is based on property values.

**Rationalisation**
Assessment of property in order to make the most efficient and economic use of it. A review of how premises can be best utilised, and the setting of a programme to accomplish this.

**Rent**
A payment by the tenant to the landlord for use and occupation of the leased property, in accordance with a contract. (See also Market Rent, Passing Rent, Peppercorn Rent, Rack Rent)

**Rent Review**
A clause in a lease where the amount of the rent is to be reconsidered at particular intervals, usually 3, 4 or 5 yearly reviews. The methods and procedure for review will be outlined within the lease.

**Rental Value**
The rent which a property might be expected to obtain in the open market on a specific date, subject to the terms of the relevant lease.

**Repair**
To make good by restoring or renewing by replacement part or parts of a building or structure. (See also Improvements)
**Repayment Services**
Services carried out for other Departments, organisations and individuals who meet the full cost.

**Rights of Way**
Public: A portion of land over which the general public have a right of passage, eg a pathway, bridleway or carriageway.

Private: A portion of land over which a particular group of people, other than the general public have a right of passage.

**Risk Transfer**
The passing of risk from the public sector to the private finance provider under a contract.

**Road**
A strip of land over which the general public have a right of passage, not necessarily a main road, eg a pathway, bridleway or carriageway.

**ROB**
Guide and Schedule to Requirements for Office Buildings. A PACE publication intended for those involved in the procurement of office buildings, whether by new build, refurbishment or lease procurement routes. This Guide highlights the requirements, which normally ought to be incorporated or at least thought about, in office schemes.

**Sale and Leaseback**
The sale of a feuhold property for a capital sum by a vendor to a purchaser, but conditional on the vendor retaining occupation for a fixed term in return for rental payments. The vendor becomes the lessee and the purchaser the lessor.

**Scheduled Monument**
An archaeological site of national importance included in a list of protected monuments by the Secretary of State for Culture Media and Sport.

**Sequestration for Rent**
A court action by a landlord for permission to sell off the tenant's moveable property to pay outstanding rent.

**Services, Provision of**
Building Services such as heating and rubbish removal which in many leases the landlord covenants to provide, especially in a multi-occupied building where the landlord retains control over common areas.
Service Charge
The amount payable by a tenant for services provided by the landlord. The lease should clearly define the services and responsibilities and may also include a provision for reduction in service charge should the service not be provided to the agreed standard.

Servitude
A restriction on land imposed in favour of the owners of neighbouring land; it might allow a right of way or it might restrict the landowner, for example from building.

Specific Performance
A court order requiring compliance by a person in default of obligations to comply with a contract. Applied where damages would not be an adequate remedy.

Statutory Undertaker
Bodies or undertakers permitted by statute to hold certain rights of access to construct or carry out operations for the provision of public services, e.g., gas and electricity providers.

Sub-Letting
The granting of a lease by a tenant, transferring all or part of their interest in a property to another party, thereby creating a lesser leasehold interest for another tenant (the sub-tenant).

Surrender
Voluntary early termination of a lease by a tenant, often for payment of a surrender premium by the landlord or a reverse premium by the tenant to the landlord giving up possession of the property for the remainder of the term to the immediate landlord.

Suspense Account
Any book-keeping entry opened to record payments and receipts which are not proper to, or cannot for the time being, be carried to the Vote account.

Sustainable Development
Sustainable development is broadly defined as development which meets the needs of the present without compromising the ability of future generations to meet their own needs. It involves protecting the environment through the careful use of natural resources, while maintaining high levels of economic growth and employment.

Tender
The process where competitive bids are sought from a number of prospective or potential buyers/lessees/contractors/providers.
Tenure  The basis under which a property is occupied eg feuhold or leasehold.

Term  The duration of a lease. (See also Lease, Lease Terms and Prescribed Term)

“Time is of the essence”  Meaning that time limits must be strictly adhered to. Failure to adhere to strict time limits will have serious implications.

Title  The tenure of land, either feuhold or leasehold: or evidence of such ownership.

Trespass  The simple concept of trespass is not an offence in Scotland. Civil remedies are available to eject unauthorised occupiers of land.

Town Planning  Legislation and policies relating to the development and use of land, and the implementation of same by the appropriate planning authorities. (See also entries under “Planning … ”)

Uniform Business Rate  The annually adjusted rate poundage set by the DETR which when multiplied by a rateable value gives the total amount due on a business property in rates or CILOR for that year.

VAT  Value Added Tax. A tax charge on the value added to certain goods and services.

Wayleave  A licence to pass over another’s property, with or without a specified, marked route, eg to lay cables, pipes, to transport minerals extracted from land over another’s land.

Yield Up  To give up possession, especially by a tenant at the end of a lease.
REFERENCES

The following is a list of some of the publications referred to in the Estates Services Guide. It is not comprehensive, but is intended as a guide to useful documents which Premises Managers may need or wish to refer to in their day to day work.

**Apportionment Acts** - for governance of apportionment of rent and other periodical payments. *(MGT 2.5.4)*


**Arbitration Acts** - these Acts provide detailed procedures upon the appointment of arbiter and dispute resolution. *(MGT 2.6.6, MGT 2.2.9, MGT 2.5.5)*

**The Bates Review, June 1997** - recommendations to streamline the Private Finance Initiative especially in the public sector. *(ACQ 2.4.5)*

**BREEAM 98 for Offices, September 1998** - published by the Building Research Establishment (BRE) the BREEAM is a tool that allows owners, users and developers of a building to review and improve environmental performance throughout the life of the building. It was agreed by Ministers in October 1996 that the BREEAM would be used in the design of all new Government buildings and major refurbishments. *(INTRO 2.2, STRAT 4.6)*

**CAIS (Capital Asset Information Systems) Property Database Requirements** - developed by the Valuation Office Agency under the auspices of the Treasury Capital Asset Information Systems working group and issued to Departments in May 1992. Contains the mandatory minimum data set for property databases held by Departments to support effective property management and Treasury requirements for accounting for capital assets by Capital Charging. *(INTRO 2.1, STRAT 3.1)*

**Capital Charging for Property: Accounting Guidance, December 1996** - Treasury guidance introducing Capital Charging for Property Assets issued at DAO (GEN) 16/96 and amended by DAO (GEN) 6/97. *(INTRO 2.1)*

CECA Civil Estate Co-ordination Agreement - detailed procedures which Departments and PACE are required to follow in order that property decisions secure the best value for money for the Exchequer overall. Annex 4 to Appendix 2, DAO (GEN) 1/96. Also found in Government Accounting Chapter 30. (INTRO 2.1, STRAT 3.1)

Code of Practice for the Protection of Unoccupied Buildings - Produced by The Loss Prevention Council this Code gives guidance on precautions to be taken when premises are vacated, and subsequent follow up actions to minimise the risks of loss or damage. (STRAT 4.5, MGT 6.6.6, DISP 2.1)

Code of Practice on Commercial Property Leases - DETR. A voluntary Code endorsed by Ministers which should be followed by all Government Departments when dealing with commercial property leases. (INTRO 2.6, ACQ 2.6)

Commissioners Works Acts 1852 & 1894 - powers to acquire and hold land. (ACQ 3.1, MGT 1.1.2)

"Crichel Down Rules" - Rules and procedures for the disposal of surplus Crown land. Originally contained in DOE Circ. 18/84 (Welsh Office Circ. 37/84), revised 30 October 1992 and amended by DAO (GEN) 11/96. DAO (GEN) 11/96 has since been superseded by Government Accounting Chapter 32 Annex 32.2. (DISP 2.1.4)

DAO (GEN) 1/96 Efficiency Scrutiny on the Management of the Civil Estate - Issued by HM Treasury, this sets out the roles and responsibilities of Departments and PACE in relation to the Civil Estate. (INTRO 1.1, INTRO 2.1)

DEOA Departmental Estate Occupancy Agreement (for Crown Bodies) - 1996. Contained as Annex 4 to Appendix 2 of the DAO (GEN) 1/96, the DEOA governs the way in which Crown Bodies share occupation of property across the Civil Estate. (INTRO 2.1, MGT 4.1)
Disability Discrimination Act 1995 - discrimination against disabled people is an offence, especially in relation to employment. The Act implies requirements for ensuring that buildings are accessible to disabled people. (MGT 2.9.2)

The Disposal of Historic Buildings - Guidance Note for Government Departments and Non-Departmental Public Bodies, June 1999 – Department for Culture Media and Sport. This publication gives specific guidance on the special considerations that need to be employed when disposing of surplus historic buildings. These include the notion that 'best price' is not an overriding objective. (DISP 2.1.3)

DOE Circular 21/87 - in relation to contamination, the presence of contamination became a material planning consideration. (MGT 7.0)

Environmental Assessment (Scotland) Regulations 1999 (Scottish Statutory Instrument 1999 No. 1 - contains within the schedules the types of development where a need will arise to carry out an environmental impact assessment. (MGT 6.4.13)

Environmental Issues in Purchasing, March 1999 – issued by HM Treasury this gives guidance on 'Green' procurement issues. (ACQ 2.4.6)

Environmental Protection Act 1990 - put in place the legal framework for dealing with pollution, and damage to the environment. Section 159 deals with how the provisions of the Act apply to the Crown. (MGT 7.0)


First Report on Contaminated Land, House of Commons Select Committee on the Environment - key findings prompted further Government action on i) information on where land may be contaminated, ii) quality assessment criteria and iii) technology and funding for clean-up. (MGT 7.0)

Government Accounting - issued by HM Treasury this comprehensive work gives guidance on most aspects of accounting policy and practice in relation to Government Departments. (INTRO 2.1)
Guidance on the Management and Care of Original Documents - Deeds and Sealing, Information Note issued by PACE. (ACQ 3.4 & DISP 3.3)

Guide for Implementing Environmental Management Systems, November 1998 – issued by DETR following the Parliamentary Environmental Audit Committee’s Report on Greening Government. The Guide was commissioned by the ENV (O), the official committee supporting the Cabinet Committee on the Environment, and is designed to help Departments to introduce and maintain an effective Environmental Management System (EMS) which will promote all round improvement in environmental performance, and help Departments gain certification under ISO 14001. The Parliamentary Audit Committee recommended that at least 75% of Departments should have at least one site certified by 2001. (ACQ 2.4.6)

Guide for the Appointment of Consultants and Contractors (GACC) PACE – CAU guide to the procurement of professional services. (INTRO 2.4)


Guide to the Requirements for Office Buildings (ROB) - PACE guide to specifications for new office buildings. (INTRO 2.2, STRAT 4.7)

"Land use Planning under a Scottish parliament" (1999), Consultation Paper – sought views on whether sub-national planning guidance should replace structure plans. The outcome of this consultation is not yet known. (MGT 6.1.6)

Local Government and Rating Act 1997 - provided for the removal of Crown exemption from non-domestic rates. (ACQ 2.4.2)

Local Government Finance Act 1988 - legislation introducing changes to local taxation systems including rating. (MGT 5.1)


Ministry of Defence: Identifying and Selling Surplus Property, 1998 - National Audit Office report by the Comptroller and Auditor General that offers guidance on options in relation to disposal or re-use of property. (DISP 1.0)

Model Policy Statement for Greening Government Operations, March 1998 - issued by DETR to help Departments draw up their own improvement programs for greening their operations taking into account Government policies and best practice. (INTRO 2.2)

National Planning Policy Guidance Notes (NPPGs) - Publications issued by the Scottish Executive's Development Department and revised periodically to give guidance on planning policy related to specific subjects. (MGT 6.1.3, MGT 6.5)

Overcrowded, Under-utilised or Just Right? Office Occupational Density Study, April 1997 - RICS/DETR publication giving guidance on office occupation densities. (STRAT 4.2)

Parliamentary Environmental Audit Committee's Report on Greening Government, July 1998. (INTRO 2.2)

Partnerships in Prosperity, November 1997 - issued by HM Treasury, this relates to basic PFI mechanisms. (AC Q 2.4.5)

Planning (Consequential Provisions) (Scotland) Act 1997 (MGT 6.1)

Planning (Hazardous Substances) (Scotland) Act 1997 (MGT 6.1)

Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 - Contains special provisions for obtaining listed building or conservation area consent in respect of surplus government land. (MGT 1.6.1, MGT 6.4.7, MGT 6.5)

Planning Advice Notes (PANs) - Issued by the Scottish Executive's Development Department. They are material policy considerations and should be consulted by Departments wishing to carry out development.
References


**The PRIME Project**: The transfer of the **Department of Social Security estate to the private sector**, (NAO 370 Session 1998-99) - Report by the Comptroller and Auditor General.

**Private Finance Initiative and Approval of Capital Projects - Guidance for Departments**, January 1995 - HM Treasury. (ACQ 2.4.5)

**RICS/ISVA Code of Measuring Practice 4th Edition** - Standardised definitions and methodologies for the measurement of buildings to help those involved in the sale, letting, purchase and valuation of property. (ACQ 2.6)

**RICS/Law Society Model Lease Clauses** - for examples of Heads of Terms. (ACQ 2.6)

**Roads (Scotland) Act 1984** - this Act sets out definitions relating to roads and public rights of way, along with the powers of the roads authorities in relation to construction of/conversion to roads. (MGT 1.6.1, 8.0 - 8.1)

**Scottish Office Circular 21/84** - Advice and guidance on Crown Land and Crown Development. Mainly concerned with planning and development issues surrounding the use and disposal of Crown land. (MGT 6.1)

**Telecommunications Code (Schedule 2, Telecommunications Act 1984)** - together with the Act this code governs the installation of telecommunications masts/aerials on property. (MGT 1.6.2)

**This Common Inheritance, Britain's Environmental Strategy**, 1990 - White Paper - for the derivation of current Government policy on conservation. (MGT 6.5)

**Towards more sustainable construction - Green Guide for Managers on the Government Estate**, April 1999 - issued by DETR - this guide aims to help the public sector to promote sustainable construction and improve their environmental performance. (INTRO 2.2)

**Town and Country Planning (Scotland) Act 1997** - (Sec 246, MGT 1.6.1 & 6.4.4), (Sec 251, MGT 6.1) (Sec 25, MGT 6.2 & 6.2.1), (Sec 28 MGT 6.3.1) (Sec 248, Sec 150, MGT 6.4.1) (Sec 37, MGT 6.4.3) (Sec 75, MGT 6.4.4).
Town and Country Planning (General Development) (Scotland) Order 1992 - covers the differing classes of minor development which are exempt from obtaining planning permission ('permitted development'). (MGT 6.3.3, MGT 6.1.1)

Town and Country Planning (Use Classes) (Scotland) Order 1997 - defines classes of similar property uses and change of use developments that do not require planning permission. (MGT 6.3.2)

Value Added Tax, Land and Property, December 1995 - HM Customs and Excise publication to assist all those involved in land and property transactions. (MGT 1.9)
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