

Consent to constitutional and organisational change and disposals



8. Consent to constitutional and organisational change and disposals

Introduction

8.1. Under the Act RSLs must apply for our consent to organisational changes and to notify us about some others. RSLs also need to seek our consent to dispose of land or to dispose of any other assets by granting security over them (referred to as disposals).

8.2. We set out below our approach to exercising our powers to give consent. We recognise that organisational and constitutional changes and disposals can be complex and technical. The scale and purpose of organisational changes and disposals are likely to vary greatly and this is reflected in our approach to considering applications for consent in terms of the level of scrutiny involved and the type and amount of information we will ask for.

8.3. RSLs must tell us if they are planning to become part of a group structure so we can discuss the consent requirements which apply to the particular proposal.

8.4. We also set below the types of disposals which are covered by the General Consent and the types of disposals which require our specific consent.

Constitutional change

8.5. The Act requires RSLs to seek our consent to any changes they make to their constitution. The exceptions to this are changes to an RSL's name or registered office, where RSLs are only required to notify us of such changes within 28 days.

8.6. Registered societies (formerly known as Industrial and Provident societies) need to send a copy of our consent letter to the Financial Services Authority (or successor bodies) to enable the change to be registered. Companies must send a copy of our consent letter to Companies House.

8.7. When considering applications for changes to an RSL's constitution we will comply with relevant legislation, consider the risks to our regulatory objective and assess how well the RSL's proposed changes fit with our constitutional requirements.

8.8. We require an RSL to ensure its proposed changes allow it to continue to meet both its legal obligations and the Regulatory Standards of Governance and Financial Management. We also expect the RSL to demonstrate that it has fully considered the benefits and risks attached to any changes.

8.9. Our guidance explains the process RSLs should follow when amending their constitution. This includes the information we require and how long it will take us to assess the application.

8.10. An RSL proposing to change its constitution to become a subsidiary of another body needs to apply to us for consent. Group structures are evolving in ways that may increase our regulatory risk, for example, due to the types of activities subsidiaries become involved in, and our level of scrutiny will reflect this. Given the implications of this type of change we are likely to carry out a more detailed level of scrutiny of the RSL's application than we may carry out for some other applications. More information on this is set out in our guidance on group structures.

Applying for constitutional changes

8.11. The processes below do not apply to constitutional changes which involve an RSL seeking to become a subsidiary of another body.

8.12. The consent process for constitutional changes involves the RSL submitting an application form to us to apply for consent. If we are satisfied with the proposed change, we will grant in principle consent, and then, if the change is approved by the RSL's members, we will confirm our formal consent.

8.13. An RSL seeking to change its charitable objects or an RSL wanting to adopt charitable status, requires OSCR's in principle consent. It must apply to OSCR for this before applying to SHR for in principle approval.

8.14. The Scottish Federation of Housing Associations (SFHA) has a model constitution for its members. We will engage with the SFHA to ensure that the model fully reflects our constitutional requirements.

8.15. An RSL can self certify that it is updating to an agreed SFHA model constitution with no changes. We will then issue our consent and require the RSL to send us a copy of the signed constitution when it has been approved by its members. This will complete our consent process. The only exception to this would be where, in adopting the model constitution, this would result in the RSL changing its objects, purposes or powers. If an RSL is proposing to change any of these, it will need our consent and it will have to provide us with the business case for this in advance.

8.16. Where an RSL does not want to adopt the SFHA model constitution (or another approved model) it needs to apply to us for consent. We will consider the RSL's proposed constitutional arrangements but it must ensure our constitutional requirements are fully reflected in the submitted constitution.

Self certification process

8.17. An RSL can change the following parts of its constitution using the self certification process and self certification forms:

- » **Changing the number of governing body meetings:**
An RSL can change the number of times its governing body meets provided the change means the governing body will still meet at least six times per year;
- » **Postal voting:** If an RSL has provisions for postal voting for general meetings in its constitution and wishes to remove this. Or if an RSL would like to add this to its constitution;
- » **Area committees:** Where an RSL has provisions for establishing area committees within its constitution it can remove these and self certify the change; and
- » **Seal:** If an RSL has a provision within its constitution for having a seal and it wishes to remove this then it can do so if it self certifies that it has replaced this provision with suitable wording which confirms deeds and documents will be executed in line with its legal obligations. The RSL should seek suitable professional advice about the alternative wording.

Organisational change

8.18. Sections 96 to 104 of the Act set out the legislative requirements for RSLs seeking to restructure (including amalgamating with another RSL, carrying out a transfer of engagements, or amalgamating with a registered company). It also covers voluntary winding up and dissolution of RSLs. RSLs are required to seek our consent to these changes. Our separate guidance sets out more details about the types of organisational changes which require our consent.

8.19. Every organisational change proposal is different, based on the objectives and circumstances involved. To ensure that our scrutiny is proportionate and effective, we will tailor the information needed and our assessment to individual cases. Our separate guidance details the processes involved when seeking consent to each of these changes, which is based on the principles set out in this framework.

8.20. From an RSL perspective, the key stages in a restructuring proposal, such as a transfer of engagements, are likely to include:

- » option appraisal;
- » development of a business case;
- » development of a business plan, including a risk assessment and financial projections;
- » tenant and other key stakeholder consultation; and
- » production of an implementation plan.

8.21. Our consent process depends on the particular circumstances of the proposal. For example, where the proposal is part of a rescue or recovery strategy for the RSL then the rationale for the change will be clear so the early stages such as an options appraisal and business case may not be required.

8.22. We expect the RSL to contact us at an early stage in developing its proposals. This allows us to understand the key features of the proposal and agree what supporting information is needed; and it helps the RSL manage the process of obtaining our consent in an efficient and effective way.

8.23. Our assessment will reflect the scale and nature of the proposal and will normally include the following criteria:

- » The proposal has been discussed, scrutinised and approved by the relevant governing body/bodies and the governing body has taken appropriate professional advice.
- » Proposed governance structures are simple and clear and allows the RSL to meet our Regulatory Standards.
- » A comprehensive risk analysis has been carried out, covering all aspects of the proposal including financial viability, stress testing of projections and implications for covenants.
- » There has been adequate consultation with, and support from, key stakeholders including tenants, members, funders (who may need to give specific approval) and local authorities as well as other regulators.
- » The new (or changed) organisation is financially viable, efficient and provides good outcomes for tenants.
- » Wherever possible, the proposals benefit current and future tenants.
- » Robust monitoring systems will be established, to ensure that delivery after the proposal takes effect is achieved (for example in relation to service standards, operating costs and investment levels).

8.24. In applying these criteria, we will take account of the individual circumstances of the proposal. For example:

- » For proposals designed to remedy performance failures by one of the partners, we recognise that the immediate priority may be to address those failures while maintaining the performance of the partner RSL.
- » The rationale for a proposal may be to consolidate and safeguard existing standards of performance, with some benefits taking longer to achieve because of the circumstances involved.
- » Proposals may be designed to improve performance or efficiency in specific parts of the business, rather than in every area.
- » Enhancement of tenant interests could potentially include a wide range of factors (for example, increased capacity to invest in the existing housing stock or provide new housing; provision of additional services for tenants; enhanced ability to keep rents at affordable levels). Benefits will vary from case to case, and the partners' current performance will also be relevant. We will aim to take a rounded view of each proposal, based on the business case and views expressed by tenants.

Regulator's power to petition for winding up and asset transfer on dissolution or winding up

8.25. Section 105 of the Act covers our powers to petition for the winding up of an RSL. We can apply this power to an RSL which is a registered society or a registered company.

8.26. When serious problems are identified with an RSL, we will step in to support the RSL to resolve these. It is likely that most problems can be resolved through support or intervention but if this is not possible and where particular conditions exist, we can petition the court under the Insolvency Act 1986 to wind up an RSL. The Act sets out the specific grounds on which we can present a petition for the winding up of an RSL. We will use this power only in very exceptional circumstances. In using these powers our primary interest is to safeguard the interests of tenants and other service users.

8.27. Section 106 of the Act gives us powers to transfer the assets of an RSL which has been dissolved under section 55 (a) or (b) of the Co-operative and Community Benefit Societies and Credit Unions Act 1965 or a registered company which has been wound up under the Insolvency Act 1986. The Act sets out particular steps we must follow before the assets can be transferred, such as consulting the tenants of any houses to be included in the transfer and having regard to those views and consulting with the charity regulator if the RSL is charitable.

8.28. Section 3 of the Act includes general requirements on us to perform all of our functions in a way that is proportionate, accountable, transparent and targeted only where action is needed. These duties apply to how we exercise our powers to transfer assets under the Act.

8.29. Because the Act specifies the circumstances in which we can petition to wind up an RSL or transfer the assets of an RSL and the steps that we need to follow, we will not issue guidance covering these sections of the Act. If we are required to carry out these actions, we will follow the requirements of the legislation. We have set out in separate guidance what we determine to be steps to enforce a security over an RSL's land.

Disposal of land or assets by RSLs

8.30. Section 107 of the Act gives an RSL the power to dispose of its land or to dispose of any other asset by granting security over it. This power is subject to our consent unless this is not required under Section 108 of the Act.

8.31. When we consider disposals we want to focus our regulatory interest and resources on those disposals which either in themselves, or in the context of the RSL's circumstances, might present a risk to our regulatory objective.

General consent

8.32. Section 108 of the Act sets out those disposals which do not need consent. These include, for example, disposals by way of a lease under a Scottish Secure Tenancy. For any other disposal, an RSL must obtain our consent. When we do this, we may give General Consent to certain disposals or we may give consent for particular purposes.

8.33. We aim to make the process for obtaining our consent as straightforward as possible. The types of disposals which are covered by the General Consent under section 107 (2) (a) and when we will give consent for particular purposes in line with section 107 (2) (b) are set out in Table 1. When RSLs dispose under the General Consent they will need to ensure that they maintain an audit trail to ensure accountability to the Regulator, members, tenants and other service users.

8.34. The General Consent covers the following types of disposals with conditions attached. We will set out these conditions in our guidance on consent to disposals:

- » disposal by way of sale of untenanted social housing dwellings to another RSL;
- » disposal by way of sale of untenanted social and non social housing dwellings, land or other assets to another RSL as part of a development agreement made at the development stage. This would include both new build and redevelopment work;
- » sale of untenanted social housing dwellings bought originally for temporary use such as decant accommodation;
- » disposal by way of sale or excambion of social and non social housing land, untenanted social housing dwellings, or other assets up to and including £100,000 (but excluding tenanted social housing dwellings);
- » grant or excambion of right of way, access, wayleaves or servitude over land;
- » subsequent disposals of properties acquired under Section 135 (1) of the Act;
- » granting heritable securities to public bodies over property or land used for social housing;

- » leasing (residential and non-residential) to non-profit making (and in specific instances, profit making) bodies. This includes leasing of commercial properties;
- » disposal by way of sale or standard security for low-cost home ownership, equity sharing or voluntary sales schemes; and
- » disposals by way of sale or excambion of untenanted social and non-social housing dwellings, land or other assets over £100,000 where the RSL has provided us in advance with sufficient assurance on its approach to asset management and its disposals strategy.

8.35. When we consider an RSL's disposal strategy we want to know that:

- » the governing body has considered and agreed the strategy on the basis of appropriate professional advice;
- » it fits with the RSL's objectives and business plans and sets out the anticipated timescales;
- » it covers routine activities such as sales of shares in properties, including final shares in equity type schemes, compulsory purchase, improvement for sale and any voluntary sales policy;
- » it has considered local supply and demand issues in the case of sales;
- » the RSL has a good track record in relation to submission of regulatory returns; and
- » it is sustainable in terms of costs for the business.

8.36. Our approval of an RSL's disposal strategy and the application of the conditional General Consent would last for a fixed period. We will set this period out when we approve the disposal strategy. Thereafter, the RSL would need to make a further application. We envisage these arrangements being appropriate only where there is a significant volume of disposals expected. We require the RSL to agree a defined list of properties for disposal to be covered by the strategy. In the event that there is any material change to the agreed strategy, the RSL is required to submit a new application to us.

8.37. Disposal by way of lease of untenanted properties falls under the General Consent. This is subject to RSLs meeting certain conditions set out in the Schedule of the General Consent. A key condition is that properties cannot be leased to profit making organisations except in very specific circumstances. Other leasing arrangements will be considered under Specific consent and this is discussed further at paragraph 8.38.

Specific consent

8.38. There are four areas where RSLs need to seek our specific consent:

- » disposals by way of sale of untenanted social and non-social housing dwellings, land or other (including non residential) assets where we have not received advance or sufficient assurance from the RSL's agreed disposal strategy;
- » disposal by way of granting security over land or other assets . Where the loan relating to the standard security will be used for on-lending to a subsidiary, we will need additional information on the intra-group lending arrangements to be assured that the RSL's assets are protected. We will allow social housing assets to be used as security for funding required for non-social housing purposes where the RSL has provided us with an appropriate business case;
- » disposals by way of sale of tenanted social housing dwellings; and
- » disposals by way of lease to another organisation, whether profit making or otherwise, which does not fall under the General Consent in current guidance. There are conditions attached to this type of disposal and these are set out in our guidance. Disposals by way of lease of social housing dwellings to support new funding initiatives will require specific consent. In deciding whether or not specific consent will be granted we will want assurance that there are no regulatory impediments to the proposals and that there is a strong business case in terms of our regulatory objective as well as the organisation's objectives.

8.39. The Act makes provision for consultation by landlords in relation to certain types of disposals under Parts 9 and 10 of the Act. What form the consultation takes is dependent on whether the disposal affects tenants with a SST or not. Where the tenant with a SST ceases to be a tenant of the RSL due to the proposed disposal, special procedures are required in terms of tenant consultation under the Act. In particular, landlords would have to obtain tenant authorisation, which may involve either tenant ballot or written agreement of tenants, before we will consider an application for consent. We have set out guidance on when broader consultation would be required and when a ballot rather than a written agreement will be necessary. We will direct a ballot of tenants unless a clear business case for written agreement is made by the RSL. In making our decision about this we will take account of the scale of the proposed disposal and the safeguards in place for tenants.

8.40. The table opposite explains when an RSL requires our consent.

Other issues

8.41. We will not prescribe a required valuation basis for social housing assets being disposed of as security for private finance, but will leave this to negotiation between RSLs and lenders based on the professional advice of valuers. Some RSLs use 'market value with tenancies' as the basis for loans, even if these are secured on social housing stock. We may require to see the valuation when we are considering an application for consent to dispose of assets as security.

8.42. We will only give consent for fixed or floating charges (these only for companies) in respect of lenders, public bodies, voluntary organisations with a financial interest in a development and a builder, or developer, taking a charge limited to the development period. This is in order to make sure RSL assets are used to support core activities.

8.43. We do not give consent for floating charges on RSLs that are registered societies because these have no value as a receiver cannot be appointed.

When RSLs require our consent

Type of Disposal	Consent Required	General Consent	Specific Consent
Sales to Tenants with Statutory Right To Buy	No	-	-
Leases to Tenants under Scottish Secured Tenancy or what would be SST but for Schedule 1 of the 2001 Act	No	-	-
Leases to Tenants under a Short SST	No	-	-
Leases under assured tenancy agreements or assured agricultural occupancies	No	-	-
Leases under what would be an assured tenancy but for any of paragraphs 3 to 8 and 12 of Schedule 4 of the Housing (Scotland) 1988 Act	No	-	-
Occupancy Agreement	No	-	-
Sale of untenanted social housing dwellings to another RSL	Yes	Yes	-
Sale of untenanted social and non social housing dwellings, land or other assets to another RSL as part of a development agreement made at the development stage	Yes	Yes	-
Sale of untenanted social housing dwellings bought originally for temporary use such as decant accommodation	Yes	Yes	-
Sale or excambion of social or non social land, untenanted social housing dwellings or other assets up to and including £100,000	Yes	Yes	-
Grant or excambion of right of way, access, wayleaves or servitude over social or non social housing dwellings and land	Yes	Yes	-
Subsequent disposal of properties acquired under Section 135 (1) of the 2010 Act	Yes	Yes	-
Granting heritable securities to public bodies over property or land used for social housing in exchange for public funding for that housing in favour of named bodies listed in the General Consent	Yes	Yes	-
Leasing – both residential and non residential – to non profit making (and in specific instances, profit making) bodies subject to conditions	Yes	Yes	-
Disposal by way of sale or standard security for low cost home ownership; equity sharing or voluntary sales schemes subject to conditions	Yes	Yes	-
Sale or excambion of untenanted social housing dwellings or land over £100,000	Yes	Yes, if prior agreement with SHR	Yes, if no prior agreement with SHR
Sale or excambion of untenanted non social housing dwellings or land over £100,000	Yes	Yes, if prior agreement with SHR	Yes, if no prior agreement with SHR
Disposal by way of sale of tenanted social housing dwellings	Yes	No	Yes
Granting standard security over social and non social housing dwellings, land or assets	Yes	No	Yes
Disposal by way of lease to another organisation, whether profit making or otherwise, which does not fall under the General Consent (for example to support new funding initiatives)	Yes	No	Yes