



To: Regional Directors and Regional Finance Directors, NHS England and NHS Improvement; Accountable Officers of Clinical Commissioning Groups; NHS Trust and Foundation Trust Chief Executives and Directors of Finance.

NHS England and NHS Improvement Publishing Approval Reference: 001431

Dear Colleagues

NHS Property Companies: occupancy agreements and payment of charges

The purpose of this letter is to set out the expectations of NHS England and NHS Improvement and the Department of Health and Social Care (DHSC) in respect of occupancy and charges for properties owned by NHS Property Services (NHSPS) and Community Health Partnerships (CHP).

NHSPS will provide its customers with an Annual Charging Statement (ACS) each financial year. Occupants of NHSPS properties will be expected to (if they have not already done so), agree their ACS for 2019/20 with NHSPS by the 1st April 2020, and then sign one of the 2 standardised occupancy documents agreed by NHS England and NHS Improvement / and DHSC or a lease where appropriate. NHSPS will ensure that the charging Schedules are materially correct.

Occupants of CHP properties will be expected, (where they are not already in place) to enter into sub-leases as quickly as possible, in line with the contracts with the NHS LIFT Company landlords.

All undisputed amounts invoiced by the companies should be paid within the normal 30 days expected of government entities.

We would be very grateful if you would therefore share this information with the relevant people within your organisation to ensure these goals can be met.

Background

The main aim of these NHS property companies, which are wholly owned subsidiaries and part of the DHSC group, is to provide an efficient and effective service to users of properties that transferred to those companies in April 2013.

Both companies have since worked with tenants to formalise occupancy and charging arrangements and collect payments that are owed. A recent Public Accounts Committee (PAC) examination of these issues at NHSPS highlighted significant challenges. We are therefore jointly writing to all NHS bodies to explain the principles and actions required to accelerate progress in these areas.



Occupancy agreements

Compliance with existing agreements

Where existing leases or other occupancy agreements are in place, the companies as landlords and the tenants must comply with the terms of those agreements as to invoicing and payment of rent and associated charges and other obligations.

Occupancy regularisation in NHSPS buildings

In addition to a standard lease, the company has developed two other forms of occupancy agreement, which occupiers currently without written occupancy agreements will be expected to sign. The current priority is for occupiers and the company to confirm agreement, via the Annual Charging Schedule, of occupied areas and rent and associated fixed occupancy charges in all instances where there is not already an occupancy agreement in place. In due course, separate agreements will be required for services.

Occupancy regularisation in CHP buildings

CHP, as Head-Tenant for the NHS LIFT buildings is contractually required to ensure that all occupiers are on formal sub-leases. Many of the terms of the sub-leases are determined by NHS LIFT company landlords and must be passed on to occupiers through the sub-leases, although CHP offers some flexibility in its underlease terms.

Charging policies absent occupancy agreements

NHSPS charges

The basis of NHSPS' charges is outlined in the Consolidated Charging Policy, which was approved by NHS England and NHS Improvement and the Department of Health and Social Care (DHSC) and published in September 2017¹, but in summary, NHSPS freehold properties and long leasehold properties are charged to occupiers at a market rent. Leasehold properties are charged as a pass through of the superior lease (with management fees applied on leaseholds to cover the costs of administration). Where there are two or more occupancies in a building, charges are apportioned on an occupied space basis.

CHP charges

The NHS LIFT properties are subject to pass through charges set out in the original LIFT contracts entered into by the local NHS, and CHP must pass on the terms applied by the ultimate LIFT company landlord, apportioned as necessary.

¹ <https://www.property.nhs.uk/about-us/policies/charging-policy>



NHSPS 2019-20 Annual Charging Schedules

NHSPS has undertaken a full data collection across its portfolio to validate occupancy data. The company has issued Annual Charging Schedules for 2019-20 to all occupiers, by means of which the main terms of occupancy are intended to be fixed (absent any form of existing agreement).

Occupiers are asked to confirm their agreement to the Annual Charging Schedules within four weeks of receipt of this letter, where they have not already done so; or raise queries with the company if they consider that there are inaccuracies to ensure the 1st April 2020 deadline is met. To ensure a shared understanding of the charges, NHSPS is contacting occupiers to arrange 'check-in' discussions.

The charges in the 2019/20 Annual Charging Schedule will apply and then be formalised in a lease, or one of the standard occupancy documents, agreed by NHS England and NHS Improvement and NHSPS.

Where the companies and NHS tenants cannot agree rental levels, NHS England and NHS Improvement regional teams will where possible help NHSPS resolve disputes. If still unresolved the matters will be referred to the arbitration process agreed between NHS England and NHS Improvement and DHSC (summarised in Annex A).

Ahead of the financial year end, we remind all recipients of charges from the DHSC owned property companies to make appropriate financial provision on a prudent basis for the charges stated in the Annual Charging Schedules and for prior years.

Occupation change controls

Given the importance of clarifying terms of occupancy, the companies, DHSC and NHS England and NHS Improvement have agreed some further principles:

- Changes to occupancy must follow the Occupation Change Notice (OCN) process² for NHSPS or charges will be levied in accordance with the higher of the existing schedule or the charge corresponding to the new area until the change is documented.
- Certainty over the parties' rights and obligations, including with respect to health and safety, before new occupancies commence is important for both parties. New occupiers will be expected to sign an occupancy agreement (or a lease) and the companies may refuse occupation until an occupancy agreement is in place.
- Leases will not be renewed without an occupancy agreement being in place.
- The companies will not conduct material works on occupied spaces, other than those required to ensure the satisfactory statutory compliance and condition of the buildings, until occupancy agreements (or a lease) are signed.

² <https://www.property.nhs.uk/property/report-a-change-to-your-occupancy/>



- An occupancy agreement (or a lease), will be required upon recommissioning of any service provided from one of the companies' buildings, and the companies will provide the necessary information for including in tender packs. Commissioners should engage early with the companies to ensure that the material can be provided to meet tendering timescales.

Payment of 2019-20 charges

To ensure that the companies have the cash to fund their provision of services to occupiers, **current-year charges need to be agreed and paid promptly (i.e. within invoice terms) and outstanding debt from earlier periods needs to be settled. Undisputed proportions of any charges must be paid within terms.** More detail on the principles for payment of current charges is included at Annex A.

Resolution of Prior Year Debt

The companies and NHS-body debtors are asked to agree settlements of pre-2019-20 balances as soon as practicable and in any event by 31 March 2020, and to approach this pragmatically. Where there is a material mismatch, NHS England and NHS Improvement's Regional Finance Teams will oversee the process and support a timely resolution where necessary. Where solutions cannot be agreed, the disputes will be referred to the arbitration process jointly sponsored by NHS England and NHS Improvement and DHSC.

Debtors Outside of the DHSC Group

Where amounts are owed by parties outside of the DHSC/NHS Group, the companies will follow the principles outlined above in engaging with occupiers to seek agreement to charges. The companies may however pursue appropriate legal remedies to drive settlement where agreement is not reached.

If you have any queries on the matters addressed in this letter, please direct them to companiesfinance@dhsc.gov.uk in the first instance.

Yours faithfully,

Steve Oldfield

Chief Commercial Officer

Department of Health & Social Care



Department
of Health &
Social Care



Dr Emily Lawson

National Director: Transformation and Corporate Development

NHS England and NHS Improvement



Annex A

Expectations of the Property Companies and NHS bodies in managing invoicing and payments

The overarching expectation is that the companies and their tenants will work constructively and cooperatively together to agree terms and achieve outcomes.

Requirements of NHSPS and CHP

- NHSPS will provide its customers with an annual statement of anticipated charges for each financial year; separate bills for rent and rates, and service charges and facilities management, will be issued on a quarterly basis thereafter in accordance with the Consolidated Charging Policy. NHSPS will ensure that the Charging Schedules and invoices will be materially correct.
- CHP will bill its customers monthly based on properly apportioned pass through charges from the Landlord. A separate monthly charge for estimated Soft FM costs will be made. Where a lease has been completed, as soon as practicably possible, CHP will bill in accordance with the terms of the lease.
- Elements of both service and facilities management charges are estimated and therefore subject to a conventional 'true up' process for actual costs incurred, which takes place after the end of the financial year. NHSPS and CHP will use best endeavours to inform tenants in advance of the year-end when this charge is expected to be more than 5% of the annual charges
- NHSPS or CHP will aim to formally respond to any charging disputes lodged within ten business days of formal notification. If a full response is not able to be provided in this timescale, NHSPS or CHP will liaise with the customer's nominated contact to agree the process and timescales for resolving the matter in dispute.

Requirements from NHS customers of NHSPS and CHP

- All agreed invoices must be settled within the terms of any written occupancy agreement or if none is in place, the standard payment terms as defined by Government policy (i.e. 30 days). These terms apply to all suppliers including NHSPS and CHP, and late payment may attract interest charges.
- Payment for agreed elements in an invoice must not be withheld due to disputes over other elements in the invoice. For example, rent should be settled if agreed and not tied to resolution of Service Charge/FM disputes. FM charges should not be withheld in full if a single item is in dispute. Similarly, payment of current year debt should not be linked to resolution of prior year disputes unless both parties agree otherwise.
- Invoices will continue to be issued, and payment will continue to be expected, until proper notice of vacation is given either under the terms of a lease or



through other another formal change process (such as the OCN process designed for NHSPS). There is also a legal obligation for proper written notice to be given before vacation in undocumented tenancies. Simply leaving a site (either wholly or in part) does not necessarily bring a tenant's liabilities and obligations to an end on the date they vacate. Subject to meeting defined criteria, CCGs have may be eligible to surrender surplus space to NHSPS through the Vacant Space Handback policy.

- Invoices are payable by the entity occupying a site or consuming the services on that site, other than where an explicit written agreement exists setting out an alternative arrangement, such as payment by a commissioner.
- Subsidies paid by commissioners to NHSPS or CHP should only be removed going forward where this is formally agreed and documented with both the relevant occupier and commissioner and agreement to this position is confirmed by both parties in writing to NHSPS or CHP so that the company can adjust its billing.
- The same principle will be applied going forward to NHSPS and CHP's payments to other NHS bodies for services supplied to it.
- Any dispute should be clearly defined and lodged promptly (within ten working days of receipt of invoice), via the companies' customer support centres ((for NHSPS by calling 0800 085 3015, or emailing customer.service@property.nhs.uk) and for CHP by calling (0161) 5093350 c.services@communityhealthpartnerships.co.uk). Both parties should work in good faith to resolve any such dispute within the standard payment period.
- If disputes are not specific or lodged within 30 days through this formal mechanism, then it will be assumed that no disputes exist and payment in full will be expected within thirty days of the date of issue of the invoice.
- Disputes over the levels of funding received by an occupier do not constitute valid grounds for disputing an invoice. Trusts and CCGs are expected to treat NHSPS and CHP bills in the same way as any other liability. Any cash flow or affordability issues should be resolved separately (for example for trusts in their working capital loans or providers with their commissioners) and should not impact on payment of valid invoices.
- Where it is not possible to fully address a dispute relating to an invoice within the 30 days payment terms, occupiers are expected to pay any undisputed element within that 30-day period.

Escalation of disputes

- In circumstances where disputes between the companies and NHS bodies cannot be resolved there is an independent arbitration process. This process is jointly sponsored by the DHSC, NHS England and Improvement and is used as a last resort, as an alternative to legal action. Where a dispute is between NHSPS



or CHP and an NHS owned limited company, the NHS owner may instruct its company to agree that arbitration should apply to avoid a legal dispute.

- No dispute will be referred to arbitration until the parties can demonstrate that they have engaged in good faith to resolve the matters in dispute and the agreed actions between the parties have been completed or the agreed timescales for those actions have elapsed. Amounts invoiced in line with an agreed or an undisputed Annual Charging Schedule that are outstanding for more than 60 days will be referred to the NHS England and NHS Improvement regional finance team. After the intervention period has been completed, the occupant has 30 days to make payment. Unless otherwise agreed non-payment will lead to escalation to arbitration.
- Prior to any escalation, the Company's Chief Financial Officer shall formally write to their counterpart in the Trust or CCG, copying in the relevant NHS England and NHS Improvement Regional Finance Director setting out the basis of the dispute. If no formal reply is received within ten business days, then it will be deemed that there is no objection from the Trust / CCG to commencing the arbitration process.
- Guidance will be provided to the parties on entering the arbitration process.
- The decision as to whether to accept a referral to arbitration will be made jointly by the DHSC and NHS England and NHS Improvement. Once the referral has been accepted both parties in dispute will be invited to make representations regarding the matter within ten business days of notification. The timescales for resolution will be clearly set out in such a notification.
- It is a joint DHSC/ NHS England and NHS Improvement expectation that NHS bodies should not unreasonably withhold payment and where this behaviour is evident then it is likely to accelerate the need for arbitration. It is also expected that the determination is final, and the determined payments will ensue. We expect as part of any resolution for the basis of charging going forward to be formally agreed.