

**EXPLANATORY MEMORANDUM TO
THE COMMONHOLD (AMENDMENT) REGULATIONS 2009**

2009 No. 2363

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Commonhold is a form of freehold land ownership for properties, such as flats, sharing common structures or facilities. Every commonhold has a commonhold association, which is a limited company, to run and manage the common parts and facilities - the rules governing the running of the company are set out in its memorandum and articles of association. The instrument makes consequential amendments to the rules prescribed by the Commonhold Regulations 2004 (2004 Regulations), following the general changes to company law introduced by the Companies Act 2006 (2006 Act).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Part 1 of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) introduced “commonhold” as an alternative to the conventional method of owning flats and other interdependent properties under a lease. It enables the freehold ownership of the flats or other units, with the common parts being owned by a company – the “commonhold association” – which is responsible for managing these parts and enforcing the unit-holders’ rights and obligations. A commonhold association is a company limited by guarantee (as opposed to shares) under the Companies Acts, the rules and procedures of which govern its formation and function. Its constitution is set in regulations.

4.2 The constitutional rules of every commonhold association are largely prescribed by the Commonhold Regulations 2004. This is to ensure a similar set of rules for the formation and running of all commonholds in England and Wales. The 2004 Regulations prescribe the content of the memorandum and articles of association for a commonhold association.

4.3 The 2006 Act made substantial changes to company law. In particular, companies are no longer required to have or to file a memorandum of association in its present form as a company constitutional document.

4.4 The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 will make consequential changes to the 2002 Act with effect from 1 October 2009, by (among other changes) removing references to the memorandum of association of a commonhold association. This in turn has required the removal of references to the memorandum of association of a commonhold association from the 2004 Regulations and the recasting of the commonhold articles of association to incorporate the object and other provisions, previously set out in the memorandum. Consequential amendments resulting from other changes made by the Companies Act 2006 have also been made to the prescribed articles of association.

4.5 All commonhold land must be registered as such at Land Registry and the 2002 Act (as in force until 30 September 2009) also requires the memorandum and articles of association of a commonhold association to be registered at Land Registry. The Commonhold (Land Registration) (Amendment) Rules 2009 amends the Commonhold (Land Registration) Rules 2004, which provide for the registration of freehold estates in commonhold land in the register of title kept by the Chief Land Registrar.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 The Companies Act 2006 makes a number of changes to the organisation of companies and these have given rise to consequential amendments to commonhold legislation. As a result of the amendments made to the 2002 Act, it is necessary to make the corresponding changes to references in the 2004 Regulations, including Schedule 2, the model articles of association.

7.2 The constitutional rules of a company will now be contained in the articles of association. This leaves the memorandum of association as a much shorter document, serving the limited purpose of providing evidence of the intention of each subscriber to form a company and become a member of that company. The company's internal rules are set out in the articles of association. Accordingly, the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 amends the requirement in the 2002 Act for the memorandum of a commonhold

association to state that an object of the company is to exercise the functions of a commonhold association so that this statement is to appear in the articles of association of a commonhold association instead. The Order also changes other references to “memorandum”, “memorandum or articles” and “memorandum and articles” in the Commonhold Act to “articles”. The amendments made by Companies Act 2006 and the Order also make it necessary to omit regulation 13 (which prescribes the use of the form of the memorandum of association of a commonhold association set out in Schedule 1) and Schedule 1 from the 2004 regulations.

7.3 The Companies Act 2006 makes certain new provision regarding convening meetings, notice of meetings and directors' interests. The corresponding provisions in the existing model form of articles of association have therefore been omitted from the new prescribed form. Similarly, the enhanced importance, for private companies, of the written resolution procedure in the Companies Act 2006 is reflected in a number of amendments to the articles. Otherwise, there are minor changes of detail on proxy notices, the number of directors, the company secretary and the keeping of the commonhold association's records which fall within the purview of the Companies Act 2006.

7.4 Changes made by the instrument, as far as concerns the changes made by the Companies Act 2006 to the role of the memorandum of association, will complement the changes made by the Commonhold (Land Registration) Rules 2009. They were laid before Parliament on 21 July 2009.

7.5 The changes made by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, the instrument and the Rules will come into force on 1 October 2009. If the instrument was not made, it would not be possible to register a commonhold on or after 1 October 2009 where the commonhold association was created on or after that date.

- ***Consolidation***

7.6 The instrument is the second to amend the 2004 Regulations. They were first amended by the Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order 2007. This Order made minor consequential changes under the Mental Capacity Act 2005. It replaced references to “mental capacity” with “lack of mental capacity” and to “receiver” with “deputy”. While no consolidation of the Regulations themselves is required, the instrument sets out revised model articles of association.

8. Consultation outcome

8.1 The Ministry of Justice has not carried out a public consultation on the amendments to the 2004 Regulations. All the amendments are entirely

consequential to changes made by the Companies Act 2006, which was subject to prolonged consultation.

9. Guidance

9.1 Minor changes are required to existing non-statutory guidance on the 2004 Regulations. The Ministry of Justice will update this guidance and arrange for it to appear on their website.

10. Impact

10.1 The impact on business, charities or voluntary bodies is insignificant. The practical effect of most of the changes is that information previously included in two prescribed forms is now included in one prescribed form. The substance is unaltered.

10.2 The impact on the public sector is insignificant.

10.3 An Impact Assessment has not been prepared for this instrument as no impact on the public, private and voluntary sectors is foreseen.

11. Regulating small business

11.1 The legislation applies to small business, in the same way as it does to all businesses involved in the establishment of new commonhold associations. No business is required to use commonhold, which is a voluntary alternative to long leasehold ownership.

11.2 As explained in section 8 above, no consultation has been carried out. The Ministry of Justice is taking the steps outlined in section 9 above to assist all those involved in the establishment of new commonhold associations, including firms employing up to 20 people, in understanding the changes made by the instrument.

12. Monitoring & review

12.1 The Ministry of Justice does not intend to carry out any formal monitoring of the working of the amendments made by the instrument. However, the Ministry does intend to carry out a full public consultation on the reasons for the low take up of commonhold and to identify any necessary changes to the legislation at or around the beginning of 2010. This consultation will provide an opportunity to seek views on the working and impact of the legislation and the prescribed forms of commonhold documentation, including the new articles of associations.

13. Contact

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