

# Mutual Exchange Policy

## 1. Scope and Purpose

Clarion Housing wishes to support resident's who need to move and to provide a level of choice about where they live. This policy sets out Clarion's position in respect to allowing our tenants to exchange homes.

It applies to all of Clarion's tenants with Secure, Assured, or Assured Shorthold Tenancies in self contained homes with social or affordable rent properties.

## 2. Policy Objectives

This policy aims to:

- provide tenants and staff with clear information on the requirements for a mutual exchange of properties
- set out the circumstances for assigning or surrendering a tenancy
- set out the grounds for refusing an exchange
- provide a clear appeals process.

## 3. Policy

### 3.1 Suitable exchange partners

Tenants who are eligible to exchange can do so with another eligible Clarion tenant, a tenant of another registered non-profit social housing provider, or a local authority tenant.

It is the tenant's responsibility to find a suitable person to exchange their home with, but we will assist tenants to do this by subscribing to and promoting an online national mutual exchange service.

### 3.2 Tenants Right to Exchange

Tenant's right to exchange varies depending on the type of tenancy agreement they have:

#### Secure tenants

Secure tenants have the right to assign their tenancy by way of exchange under Section 92 of the Housing Act 1985 as amended.

#### Assured (non shorthold) tenants

Assured tenants have no statutory right to exchange but usually have the right to assign by way of exchange as a contractual right in the tenancy agreement.

Assured tenants in furnished properties have the same rights, but the incoming tenant must take on the furniture and related charges. The departing tenancy leaves the furniture behind as it is tied in with the tenancy that they are assigning.

#### Protected Assured tenants

Protected Assured tenants have the right to assign their tenancy by way of exchange as outlined in their tenancy agreement and the transfer agreement.

#### Fixed term Assured Shorthold tenants

Fixed term tenants in social rented property who are exchanging with a 'lifetime tenant' protected under s158 of the Localism Act have the right to exchange.

For other fixed term tenants, including those in affordable rent properties, it will depend on whether the tenancy agreement gives a *right* to mutual exchange. However, Clarion will consider applications to exchange from customers with fixed term tenancies with a Social or Affordable Rent as long as the probationary period has been successfully completed.

#### The following residents **do not** have any right to exchange:

- Tenants with a Starter tenancy
- Tenants in a probationary period including any extension period
- Assured Shorthold Tenancies (periodic)
- Tenants with a periodic AST as a result of a break notice being served on a fixed term tenancy or where they have failed to sign a new tenancy agreement at the end of the fixed term.
- Intermediate including rent4less, key worker or market rent tenants
- Demoted tenancies
- Non assured/contractual tenancies
- Temporary (decant) tenancies (although tenants may have the right to exchange at their permanent address)
- Licensees
- Leaseholders
- Shared owners

### **3.3 Localism Act Exchanges – protection for 'lifetime' tenants**

Mutual exchange is usually by way of each tenant assigning their tenancy to the other so that each effectively takes over their tenancy, including its status as Assured or Secure and its rent level.

However, Section 158 of the Localism Act 2011 provides protection for 'lifetime' tenants, i.e. Assured (non shorthold) and Secure tenants, that held their tenancy before 1 April 2012, who want to exchange with tenants with a flexible tenancy (a local authority tenancy type) or a fixed term assured shorthold tenancy with a **social** rent which was not less than 2 years. It does this by each tenant surrendering their tenancy and the landlord granting a new tenancy. This is so the existing lifetime tenant will still have a 'lifetime' tenancy following the exchange.

For the purposes of this policy these are referred to as Localism Act exchanges. The protection is for the qualifying lifetime tenant only. In these circumstances Clarion will offer the tenant with a 'lifetime' tenancy at their current home an Assured tenancy, and the tenant with a fixed term tenancy, a new 5-year fixed term tenancy.

NB This protection does not apply where a lifetime tenant exchanges with a fixed term tenant whose property has an Affordable Rent.

The protection conferred by s158 relates to the tenancy 'lifetime' status only. It does not extend the protection to other aspects of the tenancy such as Rent Act protection, or for those exchanging to another landlord or the Right to Buy.

### 3.4 Grounds (reasons) for Refusal

Clarion will not unreasonably withhold permission to exchange. There are three sets of grounds for refusing an application for a mutual exchange. Which set applies depends on the tenancy type and whether the potential exchange is a Localism Act exchange.

The applicable grounds for refusal will be one of

- Schedule 3 of the 1985 Housing Act
- Schedule 14 of the Localism Act 2011.
- Clarion policy grounds (appendix 3)

#### 3.4.1 Schedule 3 of the 1985 Act (Appendix 1)

These apply to:

- Secure tenants
- Assured tenants where the tenancy agreement states we will only refuse permission on Schedule 3 grounds.

Clarion will apply Section 92 of the Act which allows landlords to give conditional approval where rent lawfully due has not been paid or another obligation of the tenancy agreement has been broken or not performed. Examples include approval given subject to the tenant paying the outstanding rent, clearing an untidy garden or completing a repair that is the tenants' responsibility. No other grounds for refusing the application can be used including any restrictions under planning agreements or covenants if they are not mentioned in the tenancy agreements e.g. section 106 agreements.

NB. Where an Assured tenancy agreement states '*Schedule 3 will apply where the tenant complies with reasonable conditions*', the reasonable conditions that can be applied to the approval are as set out in Appendix 3 of this policy.

#### 3.4.2 Schedule 14 of the Localism Act 2011 (Appendix 2)

These grounds only apply where the Localism Act 2011 applies to an exchange i.e. a 'lifetime' tenancy that started before 1 April 2012 exchanging with a fixed-term social rent tenant. **Only** the grounds in Schedule 14 of the Act can be used as a reason to refuse. Unlike Schedule 3 grounds,

no other conditions can be applied, including any restrictions under planning agreements or covenants - these are the only grounds for refusal (see Appendix 2).

### 3.4.3 Clarion Policy Grounds (Appendix 3)

These grounds apply to:

- Assured tenants - where the tenancy agreement contains the right to mutual exchange but there is no explicit reference to Schedule 3 of the Housing Act 1985 and only refers to 'specified grounds'. The specified grounds are those set out in Appendix 3 to this policy.
- Fixed term tenants - where there is no reference in the agreement to the grounds for refusal or only to 'specified grounds'.

**Note:** Fixed term tenants generally have no statutory or contractual right to exchange. Many Clarion agreements state that the tenant 'may have a right to exchange' and for those tenancies where two fixed term tenants wish to exchange Clarion will consider the exchange subject to any grounds for refusal or conditions set out in Appendix 3. The exchange will be completed by assignment.

### 3.5 Refusals due to Rent Arrears

Landlords aren't able to refuse MEX applications due to rent arrears unless Schedule 14 grounds apply, or we have served the appropriate legal notice or obtained a relevant court order, but can usually make it a condition of the approval that arrears are cleared by a specified date before the exchange date.

**Schedule 3 grounds** – there is no provision to refuse a MEX for rent arrears unless Clarion has obtained an outright Possession Order (OPO) or a Suspended Possession Order (SPO), or has started legal proceedings, or has served a valid Notice of proceedings for rent lawfully due that has not been paid. However, under Section 92 of the 1985 Act we can make it a condition of our approval that any arrears are cleared by a specified date before the exchange takes place.

An OPO or SPO can be used as a ground for refusal of a MEX regardless of how old the order is as long as it relates to the current property. However, if the customer has cleared their rent arrears since the order was granted by a court and now has a clear rent account, it can be ignored and the MEX granted as long as there are no other grounds for refusal.

**Schedule 14 grounds** – under the Localism Act, ground 1 of schedule 14 applies and the exchange can be refused if there is any unpaid rent that is lawfully due.

**Clarion policy grounds** (appendix 3) - these grounds contain the same reason for refusal as ground 1 under schedule 14 of the Localism Act i.e. unpaid lawfully due rent. They also contain additional grounds or conditions such as where the incoming tenant cannot clearly demonstrate that they have a sufficient level of income to afford the rent.

### 3.6 Refusals due to Under Occupation

Where the relevant grounds for refusal only allow refusal on grounds of under-occupation if the property is 'substantially larger' than required, Clarion will only allow under occupation by up to one bedroom, and will require the incoming tenant to demonstrate that they have sufficient income to cover the rent.

Where our own policy grounds for refusal and conditions apply (Appendix 3), we will not allow *any* under occupation (as defined by Clarion's Allocation Policy).

### **3.7 Refusals due to Property Adaptations**

We will only refuse a mutual exchange involving a property that has adaptations for a disabled tenant or a member of their household if the incoming household does not require such a property and the adaptations are significant e.g. the property has been purpose built for a disabled person or it has had structural changes or significant adaptations to fixtures and fittings e.g. it has level access or significant external ramping, it has wider doors and hallways for turning in a wheelchair, or it has an adapted kitchen suitable for wheelchair users or a level access shower/wet room.

A single adaptation such as a level access shower may not prevent an exchange from taking place.

We will not refuse a mutual exchange where a tenant will need the property adapted but where Appendix 3 conditions apply we will make it a requirement that approval and funding for the adaptation is obtained first. For all other exchanges we will not set a date for the exchange until the required assessments and funding are approved under our Aids & Adaptations procedures.

### **3.8 Connected Persons**

For any tenants that state they are related to a Clarion Board member, Director or Employee, the Company Secretariat must be notified using the appropriate form.

### **3.9 Approval of Application**

The tenant must be advised in writing of a decision within 42 days of requesting a mutual exchange otherwise we cannot rely on the statutory grounds for refusal. The decision can be to:

1. refuse the exchange
2. approve the exchange, or
3. approve the exchange with conditions as set out below.

Conditions can only be applied where a) Schedule 3 grounds apply and they must relate to a tenancy term or condition that needs to be met or b) Appendix 3 applies and it is one of the stated policy conditions. The exchange cannot proceed until the conditions are met.

If Clarion fails to provide the tenant with a written decision within 42 days, the tenant cannot assume consent has been given and must not proceed with the exchange, but should raise a formal complaint about our failure to make a decision.

Tenants who are moving to a smaller property by way of mutual exchange are not entitled to payment under any Clarion schemes in operation at the time which aim to encourage tenants who are under-occupying to downsize.

Where the exchange is with a tenant from another landlord, we will only give approval once a suitable tenant reference has been received.

Exchanges involving a joint tenancy cannot be approved unless both tenants have given consent by signing the mutual exchange application form.

### **3.10 Affordability**

Some single people aged 18-21 may be impacted by reductions in benefit levels that help with housing costs. We recognise that for tenancy agreements where Schedule 3 of the Housing Act 1985 or Schedule 14 of the Localism Act 2011 apply we are only able to refuse a mutual exchange on set grounds and affordability is not one of these grounds. In these cases we will discuss affordability with the applicant and what will happen if they are unable to pay the rent so they can make an informed decision on whether to proceed with the mutual exchange.

### **3.11 Unauthorised Mutual Exchange**

In the event of a mutual exchange taking place without our knowledge or written consent, we will treat the occupants as unauthorised occupiers and may take legal action to repossess the property.

### **3.12 Right of Appeal**

If a customer is eligible to exchange i.e. there is a statutory or contractual right to exchange, and is unhappy with any decision made under this policy they have the right to ask for it to be reviewed. They can do this by emailing (or posting) their reasons to Clarion within 10 working days of being informed of the decision. A Customer Support manager will review the case and reply to the customer within 15 working days.

### **3.13 Executing the Assignment or Surrender**

Both parties must be available for the assignment or surrender of tenancy to take place. As far as is reasonably possible the surrender of tenancies should happen on the same day. Where this is not logistically possible, an Agreement of Surrender will be required that specifies the date on which the Deed of Surrender can be effective.

All incoming tenants will be given full advice and information as if they are a new tenant being signed up to a new tenancy. They will be required to make any rent payments required under the terms of the tenancy agreement.

## **4. Disclosure of Information**

In providing a reference to other landlords we will disclose all known criminal activity related to the property or neighbourhood, any known child protection issues and all complaints of ASB and tenancy breaches. The application form will include a relevant consent to disclosure statement to this effect.

## **5. Right to repairs**

Incoming tenants have the same right to repair for repairs that are the landlords' responsibility as other Clarion tenants. Responsibility for any repairs that were the responsibility of the outgoing/former tenant will pass to the new/ incoming tenant, as they agree to accept the property 'as seen'.

Clarion will usually conduct a gas safety and electrical inspection checks on the day of the mutual exchange.

## 6. Monitoring

The Customer Support team leader will monitor any refusals for mutual exchanges to ensure the correct application of this policy, and ensure that the 42 day statutory deadline is met.

## 7. Definitions

**Lifetime tenants** – Secure or Assured tenants or those with a protected Assured tenancy.

**Protected Assured Tenants** – assured tenants who were previously local authority tenants and were given guaranteed protected rights when their home was transferred to Clarion or one of its predecessor organisations.

**Localism Act Exchanges** – an exchange where one of the parties involved has a fixed term assured shorthold social rent tenancy and the other has a lifetime tenancy that started before 1<sup>st</sup> April 2012.

## Appendix 1

### **Grounds for Refusal of Mutual Exchange by way of assignment under Schedule 3 of the Housing Act 1985:**

#### **Ground 1 – Possession Order outstanding**

The tenant or the proposed assignee is subject to a possession order or a suspended possession order.

#### **Ground 2 – Possession proceedings outstanding or NSP in force**

A notice seeking possession is in force against the tenant or the proposed assignee under Grounds 1 - 6 of Schedule 2 of the 1985 Act (and similar or/and equivalent grounds under Schedule 2 of the Housing Act 1988) or possession proceedings have begun against either party on one or more of those grounds.

#### **Ground 2A – In respect of the tenant or the proposed assignee or a person who is residing with either of them**

If a specified type of injunction (e.g. Anti-social behaviour injunction), demotion order, an anti-social behaviour order or a possession order (included suspended order) granted on the grounds of nuisance conduct is in force or if court action to obtain such an order is pending in respect of the tenant or the proposed assignee or a person residing with either of them.

#### **Ground 2B – Closure Notice or Order**

If the property is subject to a closure notice or closure order under the Anti-social Behaviour, Crime and Policing Act 2014.

#### **Ground 3 – Under-occupation**

The accommodation is substantially larger than is reasonably required by the proposed assignee.

#### **Ground 4 - Suitability**

The size of the accommodation is not reasonably suitable for the needs of the assignee.

#### **Ground 5 – Non-housing accommodation or employment**

The dwelling forms part of, or is within the curtilage of, a building which is held mainly for non-housing purposes or is situated in a cemetery and was let to the tenant or his predecessor in connection with their employment with the landlord, or with a local authority, a new town corporation, housing action trust, Development Board for Rural Wales, or the governors of a grant-aided school.

#### **Ground 6 – Conflict with charitable aim**

The landlord is a charity and the proposed assignee's occupation would conflict with the objects of the charity.

#### **Ground 7 – Accommodation designed for the disabled**

The dwelling is designed to make it suitable for a physically disabled person and if the exchange took place, no such person would be living in the dwelling.

**Ground 8 – Landlord is a specialist housing provider**

The landlord is a housing association or housing trust which provides accommodation only for persons whose circumstances, (other than merely financial circumstances), make it especially difficult for them to satisfy their housing needs and if the exchange took place there would be no such person living in the dwelling.

**Ground 9 – Accommodation in group designated for special needs e.g. sheltered or supported housing**

The dwelling is one of a group that is let to persons with special needs, and a social service or special facility is provided close by in order to assist the tenants - if the exchange took place there would be no person with special needs living in the dwelling.

**Ground 10 – Management Agreement**

The dwelling is the subject of a management agreement where the manager is a housing association of which at least half the members are tenants subject to the agreement, at least half the tenants of the dwellings are members of the association, and also that the proposed assignee is not such a member nor is willing to become one.

## Appendix 2

### **Grounds for refusal of a mutual exchange by way of surrender and granting of tenancies under Section 158, Schedule 14 of the Localism Act 2011:**

Unless otherwise stated, the grounds for refusal are the same as those under Schedule 3 of the 1985 Act set out in Appendix 1 above.

#### **Ground 1**

Any rent lawfully due from a tenant under one of the existing tenancies has not been paid.

#### **Ground 2**

An obligation under one of the existing tenancies has been broken or not performed.

**Ground 3** – Same as Schedule 3, ground 1

**Ground 4** – same as Schedule 3, ground 2 for Secure tenants

**Ground 5** – same as Schedule 3, ground 2 for Assured tenants

**Ground 6** – same as Schedule 3, ground 2A

**Ground 7** – same as Schedule 3, ground 3

**Ground 8** – same as Schedule 3, ground 4

**Ground 9** – same as Schedule 3, ground 5, except employment may also be with a development corporation or an urban development corporation.

**Ground 10** – same as Schedule 3, ground 6

**Ground 11** – same as Schedule 3, ground 7

**Ground 12** – same as Schedule 3, ground 8

**Ground 13** – same as Schedule 3, ground 9

**Ground 14** – same as Schedule 3, ground 10

## Appendix 3

### Additional grounds and conditions

The following grounds and conditions apply to any mutual exchange where neither Schedule 3 of the Housing Act 1985 nor Schedule 14 of the Localism Act 2011 are referred to in the tenancy agreements:

- All grounds for refusal set out in Schedule 3 of the 1985 Housing Act and Schedule 14 of the Localism Act 2011 (this includes any rent lawfully due from a tenant under one of the existing tenancies has not been paid).
- Where the property is too large for the incoming tenant and will result in under occupation (in accordance with Clarion's Allocation Policy at the time of the exchange) – this limits the level of under occupation allowed under Ground 7 of Schedule 14.
- Where the incoming tenant would require adaptations to the property for it to be suitable for their needs, the adaptation and necessary funding needs to be approved in line with Clarion's Aids & Adaptations policy & procedure before the MEX can take place.
- The incoming tenant's landlord has not provided a satisfactory reference.
- Where any conditions of planning agreements, covenants, head leases, Section 106 agreements that relate to the property would prohibit the incoming tenant from moving to the property, for example where the housing is only to be provided for people with a local connection.
- Where the incoming tenant cannot clearly demonstrate that they have a sufficient level of income to afford the rent. (e.g. as a result of either welfare benefit entitlement, or a general lack of income)
- Where the incoming tenant plans to bring any pets that Clarion would not give permission for under its Pets Policy.
- Where money has been exchanged between partners to facilitate the exchange.
- Exceptional circumstances where it would not be reasonable to consent to the exchange (these decisions must be approved by the Director of Customer Services or Housing).

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