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# Shared ownership: Joint guidance for England

Homes and Communities Agency, Council of Mortgage Lenders and National Housing  
Federation



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## Introduction

1. From 1 December 2008 the Housing Corporation ceased to exist and its investment and regulatory functions were split between 2 new agencies; the Homes and Communities Agency (the Agency), and the Tenants Services Authority (TSA) respectively. This Shared Ownership Guidance has been updated to reflect recent changes to the administration of shared ownership and will be valid through the transition to the new agencies and beyond. This guidance provides information for:

- mortgage lenders in England;
- registered social landlords in England (referred to in the guidance as Housing Associations (HAs). Please note that registered social landlords will become 'Registered Providers' under the TSA's new regulatory arrangements); and
- conveyancers in England

on a range of shared ownership issues that have been the subject of both discussion and consultation in recent years, and which are currently set out in a variety of different documents. The aim of this guidance is to consolidate all the information in one document, and to promote an efficient working relationship between lenders and HAs that recognises the competing pressures and regulatory requirements they both face. The information will also be of interest to conveyancers who may be instructed to carry out some of the requirements set out below as part of the conveyancing process in first and subsequent sales of a shared ownership property. The Homes and Communities Agency welcomes this guidance as an important contribution to meeting the Government's aspiration that partners involved in the delivery of shared ownership should work together to enhance the efficiency of this product and widen opportunities for home-ownership.

2 This guidance relates specifically to the Agency's grant funded shared ownership products; New Build HomeBuy (NBHB) and Social HomeBuy (SHB). It does not provide information on shared ownership through Section 106 agreements with no Agency grant, or on the operation of Open Market HomeBuy (OMHB), the First Time Buyer's Initiative (FTBI), or the new HomeBuy Direct scheme (which are equity loan products that work by extending a purchasers' buying power through the provision of an equity loan to sit alongside a conventional mortgage). These equity loan products (OMHB, FTBI and HomeBuy Direct) do not require the use of leasehold agreements and fundamentally differ from the shared ownership products

discussed here in their structure and funding arrangements. All purchasers of Government funded HomeBuy products, including shared ownership products (i.e. New Build HomeBuy and Social HomeBuy) are subject to robust affordability checks by HomeBuy Agents (appointed by the Agency) – and in the case of Social HomeBuy their landlord – to ensure that they can afford home ownership.

In particular, the latest updates in this guidance relate to:

- the removal of the clawback provision for key workers accessing shared ownership
- updates to the fundamental clauses that are required in shared ownership leases
- variations on shared ownership leases on grant funded schemes
- the removal of old restrictions
- extending shared ownership leases.

## Content of the joint guidance

3. The guidance includes:

- An overview of the current shared ownership sector (paragraphs 4 to 9);
- The sample shared ownership leases and what clauses **must** be included in every lease including the mortgagee protection clause (the MPC) and the protection it provides lenders against loss on default (paragraphs 10 to 13);
- How to deal with stamp duty land tax (SDLT) (paragraphs 14 to 15);
- The need to obtain the HA's consent to a mortgage used to buy a shared ownership property (paragraphs 16 to 23);
- Variations made to shared ownership leases and when the Agency's consent is required (paragraphs 24 to 31);
- Land Registration requirements (paragraphs 32 to 34)
- Charging Orders (paragraph 35)
- Extending shared ownership leases (paragraphs 36 to 37);
- Key worker sales (paragraphs 38 to 40);
- Rural repurchase schemes (paragraphs 41 to 43);
- Social Homebuy (paragraphs 44 to 47)
- Flexible tenure/downward staircasing (paragraphs 48 to 60);
- Taking possession of a shared ownership property and the joint approach agreed between HAs and lenders (paragraphs 61 to 66);
- Shared Ownership trusts (paragraph 67);
- Home ownership for people with long-term disabilities (paragraph 68); and
- How the guidance will be updated (paragraph 69).

## What is shared ownership?

4. Shared ownership was introduced in the early 1980s to help people who are in housing need and cannot afford to buy a home outright. Priority will normally be given to existing local authority or HA tenants; those on local authority or HA waiting lists; key workers (for example, nurses and teachers), and other first time buyers (with a combined household income of up to £60,000 per year who are unable to purchase a home without assistance). At present, there are approximately 111,000 shared ownership properties which together constitute the largest form of low cost home ownership after the Right-to-Buy. Government funding for the shared ownership development programme currently provides around 18,000 homes each year.

### **The Standard Model**

5. Through shared ownership, the purchaser buys a share of the property and pays rent on the remaining share. Further shares can be bought until, in most cases, the property is owned outright. Although the property is not owned outright initially, the shared owner has the normal rights and responsibilities of a full owner-occupier. Shared ownership homes may be new or renovated flats or houses. In most instances the shared owner will be a leaseholder with a 99 year lease on the property (the time period specified in the Agency's sample leases). Other periods can be used, although to qualify for Agency Grant funding the term of the lease must be at least 25 years longer than the term of the RSLs long term loan, and be acceptable for mortgage purposes.

6. The purchaser will buy an initial share of the property of between 25% and 75%, and this is usually funded by taking out a mortgage. While the minimum share that can be bought initially may vary, the minimum initial share for schemes funded by the Agency is 25%. The share owned by the leaseholder can be varied by 'staircasing'. Generally, staircasing will be upward, thereby increasing the share owned. In exceptional circumstances (as a result of financial difficulties, and where the alternative is repossession), and at the discretion of the HA, shared owners may staircase down, thereby reducing the share they own. "Reverse" or "downward" staircasing has been infrequently practiced and is not a right; and lenders will generally want a provision in the lease requiring their consent. Except in certain rural schemes and shared ownership schemes for the elderly (see below), all Agency funded schemes must allow for the leaseholder to staircase to 100% and own the property outright.

### **Variants on the Standard Model**

7. Some HA rural shared ownership schemes might restrict the level of equity that can be purchased to 80%. Newer leases may also provide for the repurchase of the property by the HA once the maximum share has been purchased and the shared owner wishes to sell. Restrictions on both staircasing and the sale of shared ownership properties are aimed at retaining affordable housing in rural areas in perpetuity. On some developments planning requirements as a result of s.106 agreements may place further restrictions on purchasers both on initial purchase and subsequent sales. Some of the restrictions may limit the opportunity for accessing Agency funding and/or the willingness of lenders to make mortgages available. In addition to the restrictions outlined above, the Housing and Regeneration Act 2008 has given the Government power to designate certain areas as “protected”. These are areas where shared ownership housing is hard to replace, (for example in rural areas) and must, by law, be retained. The Act enables an upper limit to be set on staircasing as a mechanism for achieving retention of homes in these areas. Protected areas could also include difficult to replace housing in specified urban locations.

8 Shared ownership schemes for the elderly restrict the maximum share to 75% of the property. Other conditions attached to these schemes include, for example, shared owners must be 55 years or over; there must be no rent provision where the maximum share of 75% has been acquired, and there must be provision for a warden service or access to a warden service.

9 Homes purchased through the Social HomeBuy scheme can be purchased at a discount either outright or under shared ownership terms (minimum initial share 25%) depending on the financial circumstances of the individual.

## Shared ownership leases

Source information from the Homes and Communities Agency ([www.homesandcommunities.co.uk](http://www.homesandcommunities.co.uk)):

Sample shared ownership house and flat leases

- HC Circular HC26/86
- HC Circular 12/03
- The Agency's Affordable Housing Capital Funding Guide, which is regularly updated as products and policies change. The latest version of the Affordable Housing Capital Funding Guide can be accessed through the Agency's website at the address above.

### Sample leases

10. HAs providing shared ownership homes have to ensure that the leases are acceptable to lenders so the purchaser is able to obtain a mortgage to buy an initial share. To assist HAs, the Agency has published a variety of sample shared ownership leases covering:

- flats;
- houses;
- schemes for the elderly; and
- rural schemes.

11. The sample leases for both flats and houses are currently available on line, and can be downloaded from the Affordable Housing Capital Funding Guide on the Agency's website.

These sample leases are for:

- Shared Ownership (for schemes grant funded pre-April 2006)
- New Build HomeBuy (for schemes grant funded post April 2006)
- Social HomeBuy

12. HAs do not have to use the sample leases. However, where a HA chooses not to use them, they must ensure that the leases contain the fundamental clauses specified by the Agency. Adoption of the fundamental clauses is implied in acceptance of the funding conditions.

## Fundamental clauses

13. The following clauses are mandatory, and so **must** be included in all grant-funded shared ownership leases:

- **Alienation provisions:** It is essential that all shared ownership leases contain provisions ensuring that the price payable for the lease is no greater than the appropriate percentage of the market value of the property. In addition, these provisions prevent the shared owner from sub-letting or parting with possession of part of the property so as to protect public funds and ensure that applicants are not entering shared ownership for commercial gain. (clause 3(15) sample NBHB flat lease and clause 3(15) sample NBHB house lease). HAs may allow sub-letting in exceptional circumstances, as described in the Affordable Housing Capital Funding Guide, when the leaseholder can demonstrate the agreement of their mortgage lender.
- **Service charge provisions:** Where a shared owner buys a flat, a service charge will invariably be levied. The shared owner will have to pay a proportion of the total service charge costs, and the HA will need to consider the cash flow implications when setting the date on which the service charge becomes due. HAs should consider steps to ease the financial burden placed on tenants, such as instalment payments, which have to be provided for in the lease.
- **Mortgagee protection clause:** The mortgagee protection clause (MPC) is designed to cover the lender's loss (including from the HA's share, where appropriate) should the lender have to take possession of the property on default. The MPC only operates where the sale proceeds are insufficient to cover:
  - a. the principal amount due under the mortgage;
  - b. the reasonable cost of recovering or trying to recover any money due under the mortgage, and acquiring and selling the freehold (including a reasonable allowance for legal, valuation and estate agency work undertaken by the lender's employees);
  - c. any mortgagee protection or endowment policy premiums payable by or recoverable from the leaseholder and secured by the mortgage; and
  - d. not more than 12 months' unpaid interest due under the mortgage.

The lender is also able to claim back capitalised rent through the MPC. The inclusion of the MPC (protecting the lender) means that the purchaser does not need to take out Mortgage Indemnity Guarantee (MIG) insurance. As the MPC provides similar protection to MIG, the MPC also should be sufficient to meet lenders' requirements (clause 8 sample NBHB flat

lease and clause 6 in the sample NBHB house lease). Certain conditions apply before a lender can use a MPC, and these are covered in paragraphs 17 to 22 below. The MPC also places liability on the defaulting leaseholder for any amounts paid out under it by the HA. The HA is expected to take all reasonable steps to recover the money due to it, taking into account whether this can be done effectively without incurring any irrecoverable expenditure.

- **Rent review:** All shared ownership leases offered by HAs must include rent review provisions. These provisions allow the HA to repay its outstanding loan debt via the income stream from the rent payments received. HAs need to set affordable rents for their tenants.
- **The initial rent for New Build HomeBuy developments must not exceed 3% of the capital value of the unsold equity and annual rent increases are limited to RPI (based on the September figure) plus 0.5% Please note that this applies to leases from April 2006 and does not overturn provisions in earlier lease agreements.**
- **Staircasing provisions:** The shared owner is able to 'staircase' or purchase further shares of equity in the property until they own it outright. This can be in as little as 10% tranches/shares. Further shares are to be brought at the market value at the time of purchase. HAs must use the staircasing provisions included in the sample leases. HAs can also vary the size of the equity shares to be purchased, although the initial share must not be less than 25% of the equity in the dwelling, the lease must provide that the leaseholder can staircase to 100%, and the final staircase to full ownership must be at least 10%. For houses in which the HA owns the freehold, the leases imply that there should be a three-month delay from completion of final staircasing to the transfer of the freehold. In practice, most lenders insist that this happens simultaneously with completion of the transaction to protect their security, and no difficulties have arisen with this approach (fifth schedule sample flat lease and fourth schedule sample house lease). For leasehold flats, various clauses fall away when the leaseholder reaches 100% and the lease comes to resemble a standard long lease. The leases for schemes for the elderly or in certain rural areas may set an upper limit on the amount of equity that a leaseholder can acquire.
- **Right of First Refusal:** The Agency requires a standard clause or covenant be inserted into all conveyances so that, during the period of 21 years from the date of staircasing to full ownership, the purchaser or any successor in title must make an offer of first refusal to the former landlord on resale. The covenant must be a local land charge and entered into the property's register of title by the Chief Land Registrar to avoid the covenant being overlooked at the point of resale. The originating landlord can choose to exercise the option to buy back, at the prevailing market value, or nominate another HA to do so, to secure the property for further affordable housing use. The originating landlord will have six weeks to make the decision as to whether the option will be exercised. HAs are expected to have a

published policy as to the circumstances and locations in which they would anticipate exercising this option, so that the vendor can have a speedy indication of the HA's intentions. If the HA does decide to exercise this option, they will be required to complete the transaction within a reasonable timescale, the duration of which should be specified in the lease.

- In the case of flats only, a leaseholder can be required by their landlord to surrender their lease to their landlord in circumstances where they have not staircased to 100%. It is expected that this option will only be exercised where the value of the property, and the share owned, is such that it has not been possible to find a suitable nominee. The landlord would be able to re-issue the lease on shared ownership terms at a lower percentage to make the property more widely affordable.

**Note:** Prior to 1 April 2008, Shared Ownership Leases also contained a **clawback provision** in respect of **key workers**. Where a participant who was housed as a key worker changed their employment, they were obliged to notify their landlord within 7 days of that change. If they ceased to be a qualifying key worker, they were required within 5 years either to staircase to 100% ownership or dispose of their shared ownership interest to a nominee of their landlord.

**From 1 April 2008 the clawback provision is no longer required to be included in new shared ownership leases for key workers. Where the clawback clause remains in place for existing leases, the Agency will not pursue clawback in the event that a beneficiary leaves their place of employment. Key workers accessing shared ownership products are to be issued with the same lease as for purchasers who are not key workers. The Agency provides a pro forma variation for use if it becomes necessary to remove the clawback clause from an existing lease.**

#### Stamp duty land tax

14. Purchasers of shared ownership leases are responsible for the payment of stamp duty land tax (SDLT) on the lease. While not a fundamental clause, shared ownership leases should contain, for discussion with the purchaser, an appropriate SDLT statement which gives an option to the purchaser of paying SDLT in accordance with the following:

- Shared ownership purchasers can elect to pay SDLT at the outset on the market value of the property. In this case there will be no further SDLT charges at any stage.
- If no election is made, SDLT will be charged on the initial purchase in the normal way – that is, on the premium (where this is above the SDLT threshold) and the net present value of the rent payable under the lease. (In practice it is very unlikely that any tax will be due on the

rent.) \* There is then a special SDLT relief which means staircasing payments are not charged to SDLT until an 80% share of the property is reached. Any further staircasing payments which take the purchaser above this level (including the acquisition of the freehold) will attract SDLT.

\*Following the 2008 Budget, stamp duty on shared ownership homes is not payable until buyers own 80% of the equity in their home. This change effectively abolishes the £600 rule, where SDLT applied at 1% on the premium in instances where the annual rent on the lease exceeded £600, even when this was below the threshold (£125,000 or £150,000 in a disadvantaged area). The Government has also introduced a temporary exemption (holiday) from SDLT for acquisitions of residential properties worth more than £175,000 from 3 September 2008 to 2 September 2009.

15. When using the Agency's sample leases, HAs must ensure that the SDLT provisions reflect current legislation.

## Obtaining the housing association's consent to the mortgage

Source information:

The CML Lenders' Handbook for England & Wales – [www.cml.org.uk/handbook](http://www.cml.org.uk/handbook)

16. Before a shared ownership sale can be completed, the HA must:
- be shown a copy of the mortgage offer/ terms being taken out by the purchaser, and
  - **consent** to these terms in writing.

### Why is consent necessary?

17. The HA's consent is required because, under the MPC, the HA will underwrite some of the lender's loss if the shared owner subsequently defaults on the mortgage repayments. By reviewing the mortgage terms (and this is often achieved by looking at the mortgage offer documentation), the HA is able to assess their overall risk. The HA can also check that the purchaser is borrowing only enough to buy the share and is not taking out any additional debt for which the HA may also be partially liable under the provisions in the MPC. In addition, this procedure can act as an anti-fraud measure, allowing the HA to double-check that the borrower and purchaser are the same person.

### Who obtains the consent?

18. In practice, it is very rare that HAs are unable to agree to the mortgage terms being offered and consent is withheld. The conveyancer acting for both the purchaser and their lender will usually obtain the HA's consent to the mortgage. This requirement on the conveyancer to obtain consent is included in the CML Lenders' Handbook, which sets out exactly what checks a conveyancer must undertake when dealing with the purchase of a property with mortgage finance. Conveyancers should check with the lender whether they do have separate conveyancing instructions for use when lending on a shared ownership property.

### What happens if consent is not obtained?

19. Should the conveyancer fail to obtain the HA's written approval to the mortgage, the HA is not obliged to comply with the terms of the MPC. This has significant implications for mortgage lenders as their protection in the event of default is effectively lost. Where conveyancers have not obtained the HA's written approval to the mortgage, the lender would be

able to sue the conveyancer for negligence, as they have failed to comply with the lender's instructions.

20. Both HAs and mortgage lenders are keen to work positively and reach a workable solution in cases where consent has not been obtained, and in some cases, this has resulted in a joint approach:

- Lenders should check whether their shared ownership loans do have the necessary consents and, if not, seek consent retrospectively from the appropriate HA.
- Provided that consent would have been granted if applied for at the proper time, HAs are expected to provide retrospective consent to the mortgage and honour the MPC in all cases if the shared owner is complying with the terms of both the lease and their mortgage, for example, they are not in arrears with their repayments.

21. This approach should identify cases where consent has not been secured, so lenders and HAs can deal promptly with outstanding cases in an efficient way.

#### Additional Borrowing

22. There is nothing in the Agency's sample lease stopping a leaseholder from increasing their borrowing under their mortgage secured against the share owned by the leaseholder.

23. Under the Mortgagee Protection Clause (MPC), however, any further advances can only be made either to enable the leaseholder to staircase or to comply with its covenants under the lease. Covenants under the lease would allow for improvements/repairs to the property etc, but with the RSL agreement/approval. Covenants under the lease would not allow the purchase of a new car, holiday, etc. If the leaseholder wanted to take out a second mortgage, then to obtain the benefit of the mortgagee protection clause that mortgage would need to be approved by the RSL.

## Variation of shared ownership leases on grant funded schemes

Source information:

HC Circular 03/08 – October 2008 (available through the Tenants Services Authority Website at [www.tenantservicesauthority.org/server/show/ConWebDoc.15631](http://www.tenantservicesauthority.org/server/show/ConWebDoc.15631))

24. The Agency has the power to attach conditions to payment of grant. One such condition attached to shared ownership is that the leases should include the fundamental clauses described in previous sections. The Agency expects these fundamental clauses to remain intact throughout the term of the lease, but in exceptional cases there may be good reasons for varying them. Circular 03/08 changed the procedure requiring HAs to seek consent to agree variations to leases with effect from 1 October 2008. These are the changes.

### **Leases granted on or after 1 October 2008 and older leases no longer subject to a restriction on title.**

25. It is a condition of grant that the fundamental clauses should remain. If a housing association changes those fundamental clauses without the agreement of the Agency, it could face sanctions for not complying with conditions of grant, which could include repayment of the grant.

26. Circular 03/08, which will eventually be absorbed in to the Affordable Housing Capital Funding Guide, sets out a procedure for obtaining Agency agreement to vary a fundamental clause. The Agency's Regional Investment teams will consider requests, which should contain full details as set out in the above circular. Note that Agency's consent is needed for changes to fundamental clauses, or any other clause that may indirectly impact on them.

### **Leases granted before 1 October 2008 which are still subject to a restriction on title**

27. Before 1 October 2008, the Housing Corporation, through the lease and grant conditions, required a restriction to be entered at the Land Registry to the effect that no deed varying the terms of the lease could be registered without the Corporation's consent. This restriction was primarily intended to protect the fundamental clauses, although its wording means that variations to any other terms also require consent

28. The Housing Corporation, as the body with the benefit of the restrictions, applied to the Land Registry in September 2008 to withdraw all restrictions from existing leases. On 1 October 2008, the Land Registry began an exercise to search for restrictions in this form and withdraw them. However, because of the volume and variety of shared ownership leases over the years, some restrictions may remain. If it becomes necessary to vary a lease with a restriction remaining, the Agency will give a consent as before.

#### When is the Agency's consent required on a lease still subject to a restriction?

29. This list is not exhaustive but, for example, consent will be required to:
- change service charge calculations or apportionments;
  - revise rent review clauses;
  - provide a new right; for example, access over land;
  - describe a new definition of the property or estate;
  - transfer common parts or other property to the leaseholder;
  - reflect new ownership arrangements; for example, if the freehold is sold to a third party and the HA becomes the leaseholder;
  - update the lease to reflect new legislation or regulatory requirements;
  - extend the term of the lease; and
  - correct any mistakes in the lease.
30. The Agency's approval is **not needed** for purchasers to remortgage, sell, staircase or do any of the things that the lease allows them to do. Consent is not required for individual instances of downward staircasing, but HAs should comply with the Agency's requirements set out in the Affordable Housing Capital Funding Guide.
31. Two information sheets on the variation of leases are attached to this guidance at Annexes A and B. The information sheet at Annex A is for purchasers and should be included in sale information packs. The information in Annex B is for HAs and should be shared with legal advisers. These sheets can both be reproduced by HAs in their own house format.

## Removing old restrictions

32. As mentioned above, the Land Registry is removing as many old restrictions as it can trace, but a few may remain. This section is for leases still subject to a restriction.

### **Upon staircasing to 100% ownership**

33. The lease contains a provision that the restriction ceases to have effect on final staircasing. When a flat owner has acquired full ownership, they should apply for the cancellation of the restriction on Land Registry form RX3. In panel 5 of the form, the Land Registry will expect to see reference to an enclosure of either (a) a certificate that the final staircasing has been completed or (b) confirmation that the tenant has purchased 100% of the equity. The Agency need not be involved in this process. If the restriction is not cancelled at the appropriate time, there can be delay and expense for subsequent purchasers.

### **In other circumstances**

34. If it is necessary to remove a restriction in other circumstances, form RX3 may be used as above and the reference can be to circular 03/08.

## Charging Orders

35. If a shared owner defaults on mortgage payments, the commercial mortgage lender may apply to the court for an Interim Charging Order (ICO). This enables the mortgage lender to impose a charge on the interest in the property. As the terms of the lease cannot be varied without its consent, the Agency's details are entered on the Land Registry title document. Consequently, the Agency sometimes receives copies of ICOs. Lenders and their conveyancers will wish to note that, as the Agency has no legal interest in the property which is to be subject to the ICO, it cannot have a view on any proceedings, and so does not need to be informed of charging orders.

## Extending shared ownership leases

36. Legal advice received by the Agency suggests that shared owners have no statutory right to a lease extension. This position is repeated in the CIH/NHF Leasehold Management Good Practice Guide. The Agency understands that many shared ownership leases (originally granted for 99 years) are now reducing to the point where a lease extension would improve the prospects for re-sale.

37. HAs should grant extensions to shared ownership leases, wherever possible. HAs should take legal advice to ensure that any obligations under leasehold law are met. Where an extension is granted, this can often be done by means of a variation to the lease, the Agency's consent will not be required. While the lease remains in shared ownership, the Agency's view is that it does not additionally need any consent under s.9 of the Housing Act 1996.

### **Lease extensions after staircasing to full ownership**

NP. Although not strictly within the scope of this Guidance, the Agency advises HAs that extending the lease of a former shared owner:

(a) needs consent under s.9 of the Housing Act 1996, which is given in advance under category 7h of the General Consent 2008 attached to HC circular 01/08.

(b) does not need consent under the restriction on variation at the Land Registry, provided the restriction was cancelled as described above upon staircasing to 100%.

## Key worker sales

Source information:

The Agency's Affordable Housing Capital Funding Guide (2008 and updated quarterly).

38 There have been a number of shared ownership schemes for key workers that have been funded through specific programmes. In April 2004, the Key worker living programme was launched in London, the East and the South East, to assist the recruitment and retention of key public sector workers. From April 2006, support for key workers was mainstreamed through the NAHP. The programme, which provides the opportunity for Key Workers to access shared ownership homes through Newbuild Homebuy, has been extended across all 9 government office regions of England.

39 Up until 31 March 2008 all key public sector workers accessing any of the Homebuy products solely by virtue of their employment were subject to clawback (see paragraph 13). From 1 April 2008 clawback no longer applies to NBHB and the standard model lease should be used.

40. Key workers who purchased prior to 1 April 2008, who have the clawback clause in their lease, will not now be subject to clawback should they leave their qualifying employment.

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## Rural repurchase schemes

Source information:

The Agency's Affordable Housing Capital Funding Guide (2008 and updated quarterly).

41. Shared ownership schemes bid for and built as part of the Agency's rural housing programme, in qualifying rural areas, and on rural exception sites (usually areas with a population of under 3,000), may be subject to repurchase arrangements. The repurchase arrangements allow a HA to buy a property back from an existing leaseholder to enable a resale to a local household in housing need. The aim of the programme is to retain low-cost housing in rural communities.

42. The repurchase scheme operates on the basis that when a shared owner wishes to sell the property, the HA is able to repurchase it using Social Housing Grant (SHG) when all other sources of funding available to the HA for buyback has been exhausted) and is then able to re-sell on a shared ownership basis. The price paid for the property will be the full market value where the freehold or full lease is being acquired or the proportion of the current shared owner's equity stake in the property. HAs must insert an option to repurchase in the shared ownership lease at the time the lease is first issued and whenever a new lease is issued. HAs must include the option to repurchase clause in leases that provide for restricted staircasing. The right to repurchase does not affect the shared owner's right to staircase and does not apply to shared ownership for the elderly. The equity level at which resale takes place will depend on the means of the new shared owner.

43. To qualify for funding from the Agency for repurchase, the following criteria must be satisfied:

- the option to repurchase has been included in the lease;
- the HA has attempted to market the property and no local purchasers are available who can afford either the current level of equity or the original equity; but a local purchaser has been identified who can purchase at a lower level of equity;
- the RSL has looked towards their existing RCGF receipts or private finance to fund the repurchase and is unable to fund the re-purchase through these routes. They have invited another appropriate RSL to use its RCGF or private finance to purchase the property but they are also unable to fund the purchase, and
- the sum of surpluses made on any previous staircasing of the property must be less than the SHG calculated as due for the repurchase.

## Social HomeBuy

Source information:

The Agency's Affordable Housing Capital Funding Guide (updated quarterly).

44. The Social HomeBuy (SHB) scheme was introduced in April 2006 and allows Registered Social Landlords (RSLs) and Local Authorities to dispose of rented housing at a discount on shared ownership terms, to its secure and assured tenants who occupy properties eligible for the scheme, where landlords choose to participate.. Homes can be bought on a shared ownership basis with a minimum share of 25% and in minimum 10% tranches up to 100%. The home can also be bought outright at the outset. Homes cannot be purchased through SHB in areas designated as rural under Section 17(1)(b) of the Housing Act 1996.

45 Purchasers are encouraged to buy as large an initial share as they can afford and HAs are required to carry out affordability checks to help ensure that tenants buy the size of share they can afford and sustain. The maximum discount will vary, depending on the location of the property as it reflects the originating local authorities' Right to Acquire discount. The amount of discount payable will be in proportion to the initial share purchased, and additional discounts (i.e. a proportion of the total Right to Acquire discount for the property) are also available upon staircasing.

46 All leases/ conveyancing documentation must contain a repayment of discount clause, as the discount is repayable if the property is sold or the share is assigned within 5 years from the date of initial purchase or staircasing. The amount due to be repaid is calculated as a percentage of the resale value equivalent to the percentage of the discount when compared to the purchase price as follows;

- sale within year 1, an amount equal to the % value a above
- sale within year 2, 80% of the amount calculated as in a) above
- sale within year 3, 60% of the amount calculated as in a) above
- sale within year 4, 40% of the amount calculated as in a) above
- sale within year 5, 20% of the amount calculated as in a) above

No repayment of discount is required if the property is sold after year 5. Please note that separate five year periods apply to each discount received, and HAs are therefore encouraged to

keep sufficiently robust records detailing sales and the size of shares purchased, to allow for complex repayment calculations.

47. If the purchaser comes to sell their home, the landlord will have the chance to buy the property back at market value or nominate another purchaser.

## Flexible tenure: reverse staircasing

Source information:

The Agency's Affordable Housing Capital Funding Guide (updated quarterly)

48. Reverse staircasing on the following terms is a permitted use of the Recycled Capital Grant Fund (RCGF). It is a 'safety-net' to enable a shared owner to remain in their home, despite changes in their financial circumstances, and is an option of last resort where the leaseholder has got into or is about to get into mortgage arrears and is at risk of losing their home. Shared owners have no right to reverse staircasing. Please note that the Agency's sample NBHB leases permit downward staircasing without the need for any variation to be issued on the terms of the existing lease.

49. Reverse staircasing is defined as:

- the repurchase of equity by a HA from a shared owner in difficulty, but not necessarily in arrears, with his/her mortgage repayments; or
- in the case of property specifically built as shared ownership for the elderly, the repurchase of equity to pay for essential repairs or maintenance if the leaseholder cannot afford to pay for the work.

50. Equity repurchase should be at a level at which the shared owner can afford the lower payments. This can include repurchasing sufficient equity to clear the mortgage, pay off the arrears of interest and principal on the mortgage, and reduce payments to nil. There is also an option of full repurchase under which the leaseholder becomes an assured tenant of the HA. However, once the property has staircased to 100% or been taken into possession by the lender, flexible tenure ceases to be an option.

### How will flexible tenure be funded?

51. Public funding of flexible tenure is confined to finance from the RCGF. Flexible tenure cannot be funded from SHG or the Disposal Proceeds Fund. It should be noted that where schemes are funded from other sources apart from the Agency, different criteria might be applied to the way in which flexible tenure can operate.

### Who is eligible to apply for reverse staircasing?

52. The key principles are:

- **Shared owners do not have a right or entitlement to flexible tenure.** Any offer of flexible tenure remains at the discretion of the HA landlord. A HA may set its own procedures provided that they also comply with the requirements in the Agency's Affordable Housing Capital Funding Guide for flexible tenure. If a HA does offer flexible tenure, then it must publish its policy to all shared owners in order to operate in an open and accountable way.
- **The shared owner must currently own less than 100% of the property.**
- **The HA must be satisfied that the shared owner has explored and exhausted all other options.** The shared owner must produce evidence to prove their difficulty with the mortgage repayments, although they need not be in arrears. They must be able to show that other short- and long-term options have been exhausted such as loan rescheduling or selling and moving to a cheaper property within a reasonable distance from work. The assessment would also include the ability of the shared owner to meet future repair and maintenance liabilities. This should be based on advice from an independent debt counselling agency and should include consideration of Housing Benefit eligibility.

### Involvement of Lenders

53. For any form of equity repurchase or mortgage rescue, the HA are required to ensure that any offer is acceptable to the shared owner's lender and the HA's own lender.

### Basis of valuation

54. The same general rules apply to downward staircasing as to upward staircasing, ie, that the maximum amount payable will be the appropriate percentage of the current open market value determined by an independent, qualified valuer. The shared owner will pay for the valuation.

### Proceeds of the transaction

55. It will most likely be a condition of the shared owner's mortgage that the sale proceeds are paid direct to the lender who has the first charge over the property. The HA's conveyancer will advise on this, but it would avoid any risk of misuse of the money. The shared owner must pay for the valuation and his/her own legal fees. In practice, this may be a deduction from the payment to the shared owner or the lender.

### Subsequent upward or downward staircasing

56. Should the opportunity arise whereby the upward staircasing of the property occurs, the normal staircasing procedures apply. The RCGF funds used to support this transaction will be treated as RCGF again. Further flexible tenure transactions may be allowed should the shared owner's financial situation deteriorate further, even to the extent of a complete repurchase of the property and the property let as an assured tenancy. Where a shared owner staircases down to a lower level of equity, the terms of the lease will continue, including the right to staircase up again. The lease ceases in the case of complete repurchase.

### Rents after a reverse staircasing transaction

57. Whenever the shared owner staircases up or down, the rent should be adjusted pro rata for the changed percentage rented, and comply with the rent review clauses in the lease. In situations where the purchaser staircases down to zero ownership, they become an assured tenant, and the rent becomes a social rent, rather than one calculated in accordance with the lease agreement.

### Complete repurchase – tenancy considerations

58. Where a shared owner becomes an outright tenant, the shared ownership lease must be formally terminated and an assured tenancy agreement entered into on the same terms as for any other new tenancy agreement for rented housing let by the HA. It would be at the discretion of the HA whether to offer a shared ownership lease in the future.

59. The ex-shared owner will not have the Right to Acquire because the repurchase will have been funded by the RCGF, and not SHG. As a tenant, he or she may be eligible (if their circumstances improve) for any discount or incentive scheme if offered by the RSL, such as Social HomeBuy with any eligibility period starting from the date of the new tenancy.

60. The change from shared ownership to a tenancy shifts the insurance, maintenance and repairing obligations from the ex-leaseholder to the HA. Therefore, it is recommended that the HA carries out a survey of the property before completion of the reverse staircasing repurchase in order to assess any immediate and future liabilities.

# Taking possession of a shared ownership property

Source information:

HC circular F2-04/02 Shared Ownership – Mortgage Lenders' Requirements – March 2002

CML circular 1636 – April 2002

## Possession of the assured tenancy under the Housing Act 1988

61. Mortgage lenders can also use undertakings and notices to ensure that adequate security exists when they lend on shared ownership properties. An example of this would be where a HA is considering taking possession proceedings using a mandatory ground for possession, such as where the leaseholder is in rent arrears (in this situation the court would have no power to adjourn or suspend the action to allow the arrears to be repaid). Paragraphs 62-66 below illustrate how the use of undertakings and notices can provide assurance to lenders in this situation.

## Standard form of undertaking to provide notice of proceedings

62. To ensure that lenders have a reasonable opportunity of remedying a breach of the lease (which could result in a HA taking legal action under the provisions in the 1988 Act), lenders will require HAs to provide a written undertaking to give reasonable notice to the lender before legal proceedings are commenced.

63. Within the form of undertaking agreed by lenders, the notice period is intended to provide the lender with sufficient time to resolve the problem, so avoiding the need for the HA to take legal action that could result in the loss of the mortgage security. The model form of undertaking is included in the Annex C to this guidance.

## Notice to the lender of intention to take action

64. There must also be a separate notice to the lender from the HA informing the lender about the possible possession proceedings under the Housing Act 1988, and the grounds on which the action will be based. This requirement will **not** be met by serving a copy of the Ground 8 notice on the lender.

65. All new shared ownership leases granted by HAs must provide that a HA will give the leaseholder's lender at least 28 days' written notice of the landlord's intention to commence

possession proceedings under the Housing Act 1988.

66. HAs should provide a signed undertaking in the agreed format on every grant and assignment of a shared ownership lease. In addition, HAs are encouraged to adopt the standard undertaking and to work closely with lenders on this issue to maintain the favourable operating environment that has existed in the shared ownership sector. The undertaking is aimed simply at giving the lender time to remedy the breach. It does not prevent a HA bringing proceedings under Schedule 2 if the breach cannot be resolved within the period agreed by the lender and the HA.

## Shared Ownership Trusts

67 Some housing providers are experimenting with new ways to deliver shared ownership products, using a legal trust arrangement in preference to long leases. This most usually happens where developers want to provide shared ownership homes in commonhold schemes, where long leases are not permitted. As yet, there is no standardised approach to these arrangements. The Homes and Communities Agency are working to look at the potential of a non-lease shared ownership model, and any further information will be reflected in a future edition of this guidance.

## Home Ownership for People with Long Term Disabilities

68 Home Ownership for People with Long Term Disabilities (HOLD) is a tailored product for purchasers whose specific needs are not met by the standard HomeBuy products. The scheme enables eligible applicants to select a home on the open market, which is then purchased by a housing association and sold to the applicant on shared ownership terms. Where people have no financial resources, it is sometimes possible to get help from the Income Support system, if buying would be better suited to the individual's needs.

## How the guidance will be updated

69 We hope that this guidance is helpful. Any comments should be sent to Andrew Heywood at the Council of Mortgage Lenders ([Andrew.Heywood@cml.org.uk](mailto:Andrew.Heywood@cml.org.uk)), Lucy Thornycroft at the National Housing Federation ([Lucyt@housing.org.uk](mailto:Lucyt@housing.org.uk)), or Martin Farmer at the Homes and Communities Agency ([Martin.Farmer@hca.gsx.gov.uk](mailto:Martin.Farmer@hca.gsx.gov.uk)). To ensure that this guidance is kept up-to-date, the CML and the NHF will review the content on a biennial basis in consultation with the Agency.

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## Annex A

### Varying a Shared Ownership Lease: Information for new Shared Owners

1 This leaflet is about your shared ownership lease. You should keep it with the information and paperwork relating to your home as it could save you time and money if you ever need to make changes to your lease.

2 The Homes and Communities Agency is the government organisation that provides most of the money for shared ownership housing and it has to make sure that leases remain in the form agreed for shared ownership.

3 Your lease lets you to do a number of things, including buying more shares in your home or selling your share to somebody else, if you want to move, and tells you how to do it. It allows you to:

- staircase, that is to purchase more shares in the property;
- sell your share of the property to someone else;
- transfer ownership, for example from a joint to single name;
- remortgage;
- exercise any of those rights which the lease gives you.

4 It is possible that your landlord may wish to vary the lease. The terms of leases can only be varied by agreement between you and your landlord or through an order made by a Leasehold Valuation Tribunal, or sometimes a county court. There are specific procedures that need to be followed in these instances and you will need to get legal advice.

5 If the change or correction to your lease involves one of the clauses that the Agency considers to be fundamental to shared ownership, your landlord will also need to obtain the Agency's agreement. The following list does not cover every possibility but your landlord would need the Agency's agreement to change:

- the basis of service charge calculations or apportionments;
- rent review clauses;
- the landlord's right of first refusal on resale;
- the clause that protects your mortgage lender's interest in the property;
- clauses affecting your right to staircase;
- clauses setting out the procedure for selling;
- the clause that prevents sub-letting the property; and
- any other changes that have a knock on effect on the above.

6 As a shared owner, your lease gives you a number of rights and responsibilities, and you should always seek appropriate advice if you have queries about your lease. The Tenant Services Authority publishes *The Charter for Housing Association Applicants and Residents* that sets out what service you can expect from your housing association. Your landlord can give you a copy of the Charter, or you can download it from the Tenant Services Authority web site at [www.tenantservicesauthority.org](http://www.tenantservicesauthority.org).

7 If you are buying a house, you usually become the freeholder when you staircase to 100%. Then the lease ceases to apply. If you are buying a flat, you continue to be a leaseholder after staircasing to 100%, but the terms of your lease usually change. The change is that the

clauses to do with shared ownership drop out of the lease and it becomes like an ordinary private residential lease. For both houses and flats, your landlord normally keeps a right of first refusal on any onward sales for 21 years. Your landlord would not be able to alter that without the Agency's agreement.

8        Should you have a dispute with your landlord, they will have a complaints procedure to help resolve the situation. If there are still problems even when you have exhausted your landlord's complaints procedure, you can complain to the Independent Housing Ombudsman. Your landlord can tell you how to do this. But if your dispute is over certain matters connected with your lease, for example the level of service charges or your liability to pay them, then there are other routes of complaint and you should seek appropriate legal advice.

**The Homes and Communities Agency, December 2008**

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## Annex B

### Agreement to Vary Shared Ownership Leases Landlords' Information

1 This leaflet advises housing association staff and their legal advisers about obtaining the Agency's agreement to vary a fundamental clause in a shared ownership lease, on a property that had grant funding.

2 Shared ownership leases used by housing associations are generally based on sample leases issued by the Agency. Since 1989, however, housing associations have had the option of developing their own form of shared ownership leases. If they choose their own form of lease, it is nevertheless a condition of grant funding that the lease must contain certain fundamental clauses. They are described in the Agency's *Affordable Housing Capital Funding Guide* found at:

[http://www.homesandcommunities.co.uk/national\\_affordable\\_housing\\_programme](http://www.homesandcommunities.co.uk/national_affordable_housing_programme)

and deal with:

- Alienation provisions;
- Mortgagee protection;
- Staircasing provisions;
- Rent review;
- Service charge provisions; and
- Right to repurchase, which continues after final staircasing.

The clauses are designated as fundamental because they define shared ownership. It is the Agency's policy, and a condition of grant, that these clauses should remain in the leases to preserve the shared ownership purpose for which grant was paid.

### Varying fundamental clauses

3 Exceptionally, housing associations may find it necessary to vary a fundamental clause. There is a process for obtaining the Agency's agreement to this. Until 2008, the Housing Corporation required the parties to apply to the Land Registry for a restriction to be placed on the leasehold title. It reads '(Except under an order of the Registrar) no deed varying the terms of the registered lease is to be registered without the consent of the Housing Corporation'. So the Land Registry would not register any variation of the lease unless it was accompanied by a letter of consent from the Housing Corporation. As shared ownership leases grew in number, the Corporation found this blanket control of all variations to be cumbersome. It had to consider and consent to minor and uncontentious variations which it would have been content for the parties to deal with themselves. Also, the presence of the Corporation's name in a restriction on the Register involved it in much unnecessary correspondence about remortgages, transfers and debts.

4 The Housing Corporation's circular 03/08 introduced the present procedure for seeking agreement to vary a fundamental clause. A housing association wishing to vary one of the fundamental clauses of a lease should now first obtain the agreement of the Agency's Regional Investment Team for the area in which the property is situated. Note that Agency agreement is required for variations of **fundamental** clauses only. The nature of this agreement is that the Agency, if content with the proposal, would be agreeing to a breach, without penalty,

of the funding condition that shared ownership leases should contain the fundamental clauses. Non-fundamental clauses may be varied without reference to the Agency but taking account of any requirements of other parties, such as lenders. Circular 03/08 sets out a procedure. The Agency expects that the contents of that circular will eventually be absorbed into the Agency's *Affordable Housing Capital Funding Guide*.

### **Older leases with restrictions remaining on title**

5 Along with the publication of circular 03/08, the Housing Corporation introduced new sample leases which omit the requirement to place a restriction on title. So there will be no new restrictions. The Agency and Land Registry will remove as many of the existing restrictions as they can find and will eventually withdraw most of them. This will take time and, such is the accumulated volume of shared ownership leases in various forms, the process may not identify and withdraw them all.

6 Where restrictions remain on title, either because they have not yet been removed or have not been identified for withdrawal, the Agency will still need to give consent for all variations and will continue to do so by letter. Some common misinterpretations of this restriction prevent sales and other transactions from proceeding as quickly as they might. The following paragraphs clarify matters so landlords can provide a good service to the parties involved.

7 The old restriction requires the Agency's consent to variations that would make a difference to the terms of the lease. Housing associations and their solicitors generally understand this, but problems arise when other parties give the restriction a wider meaning than was intended. Thus the Agency receives many requests for consent for transactions that the lease permits, or that would not actually vary any of the terms of the lease. Examples are:

- Assignments and sales;
- Staircasing up;
- Staircasing down under the Agency's flexible tenure scheme;
- Transfer from joint to sole ownership, and vice versa;
- Remortgaging;
- Granting second charges.

**No consent is required for the transactions above.** Seeking consent for them involves the parties in unnecessary correspondence and expense. It holds up completions while parties await a response from the Agency that is not required.

8 The following are examples of changes that **do require consent under the old restriction**:

- insert a mortgagee protection clause where one did not previously exist;
- change the basis of service charge calculations or apportionments;
- revise rent review clauses;
- provide a new right, for example access rights over land;
- describe a new definition of the property or estate;
- transfer common parts or other property to the leaseholder;
- reflect new ownership arrangements, for example if the freehold is sold to a third party and the association itself becomes a leaseholder;
- update the lease to reflect new legislation or regulatory requirements;
- extend the term of the lease; and
- rectify mistakes in the lease, such as incorrect cross references.

In these cases, consent may be obtained from the Agency's Regional Investment Team under the procedure in section 5 sub-paragraph 4 of circular 03/08.

9 The Regulatory Code requires landlords to provide high standards of customer care, and that includes working to ensure that sales, staircasing or assignments are not unduly delayed, so landlords should ensure that purchasers' transactions are as straightforward as possible.

10 If legal advisers are unclear as to whether consent is required, they should contact the landlord in the first instance. It may not be possible to forestall every unnecessary request for consent in this way but, to minimise the costs to purchasers in terms of time and money, landlords should make every effort to ensure that lease terms are understood and that comprehensive information is available for the purchaser's legal advisers.

11 The Agency occasionally receives requests to remove the restriction. Most leases contain a provision that, when the leaseholder staircases to full ownership, the clause requiring a restriction falls away. If the property is a flat, the restriction remains on the register until action is taken to cancel it. The former shared owner or their successors in title should ask the Land Registry to cancel the restriction. Land Registry advises that form RX3, which can be downloaded from [www.landregistry.gov.uk](http://www.landregistry.gov.uk), is the correct form for cancelling a restriction that is no longer required. In panel 5 of form RX3, the Land Registry will expect to see reference to an enclosure of either (a) a certificate that the final staircasing has been completed or (b) confirmation that the tenant has purchased 100% of the equity. It is not necessary for the Agency to initiate or approve form RX3 to cancel a restriction. If the shared ownership property is a house, the landlord will normally transfer the freehold and the lease, along with its restriction, will end. At that stage, the Agency's only remaining interest in variations is likely to be in the landlord's continuing right of first refusal.

12 If you have any questions about consent to vary terms of the lease, please contact the Regional Investment Team of the Homes and Communities Agency.

**The Homes and Communities Agency, December 2008**

## Annex C

### Model form of undertaking

- Leaseholder:
  
- Borrower:
  
- Landlord:
  
- Property:
  
- Lease:
  
- Lender:
  
- Mortgage account number:

In the consideration of the Lender granting the Borrower a mortgage on the property, the Landlord undertakes not to commence any proceedings for obtaining possession of the Property under any of the grounds in Schedule 2 of the Housing Act 1988 without:

- a. giving the lender not less than 28 days' notice in writing of their intention to commence proceedings; and
- b. if within such a period of 28 days (or within such other period specified in the notice period, if longer) the Lender indicates in writing to the Landlord that it wishes to remedy such breach, or is going to take such action as may be necessary to resolve the problem complained of by the Landlord, giving the Lender such time as may be reasonable (in view of the nature and extent of the breach/problem) to take such action.

Signed..... Dated.....

**Address for subsequent service of any notice**

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