

Protected Areas and leasehold enfranchisement: Explanatory note

1 Purpose of the explanatory note

1.1 To advise partners and stakeholders of the Regulations¹, and provide an explanatory note as to:

- the purpose
- legislative requirements
- the policy, procedural and strategic implications²

2 Context

2.1 Regulations, in sections 300 to 302 of the Housing and Regeneration Act 2008, came into effect on 7 September 2009.

2.2 There are two main factors of risk that are addressed by the Regulations and Order:

1. Risk of early enfranchisement
2. Retention and sustainability of shared ownership housing stock in hard to replace areas

2.3 Sections 300 to 302 of the Housing and Regeneration Act 2008 enables the Secretary of State to designate 'Protected Areas', ensuring shared ownership houses are retained as such in areas that they would be difficult to replace; whilst also ensuring the mitigation of risk of early enfranchisement³.

3 Shared Ownership: policy and strategic objectives

3.1 Shared ownership schemes are integral to the government's objective to deliver more affordable homes and increase home ownership and are a major aspect of the Shared Ownership and Affordable Homes Programme with its focus on increasing home ownership.

3.2 Purchasers buy an initial minimum share of 25% of the equity of a home owned usually by a Registered Provider, and pay rent on the remainder. The provider retains the freehold and grants a long lease to the purchaser. The leaseholder may then buy further equity shares (known as 'staircasing') until the property is owned outright. Recovered grant known as Recycled Capital Grant Funding⁴ is usually used to reinvest in the development of replacement affordable housing, to ensure the future need is addressed.

¹ The Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009, 2009 No. 2097 and The Housing (Right to Enfranchise) (Designated Protected Area) (England) Order 2009, 2009 No. 2098

² This should not be interpreted as legal guidance or replace the need for the reader to seek legal advice; nor does it replace the explanatory memorandum http://www.legislation.gov.uk/uk/si/2009/2098/pdfs/ukSIem_20092098_en.pdf

³ Early enfranchisement means the tenant acquiring the freehold under statutory rights before acquiring 100% equity. The leasehold Reform Act 1967 makes provision for shared ownership leases being exempt from early enfranchisement if certain conditions are met. One such condition require that leaseholders must be able to 'staircase' up to 100%, thereby rendering any restriction open to leaving a landlord at risk of early enfranchisement.

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⁴ Recycled Capital Grant Funding (RCGF) is a process where the provider will re-invest receipts gleaned from sales of affordable housing that had public investment to bring the original development forward.

- 3.3 Previous guidance, legislation and planning policy have acknowledged the need to address the issue of availability and sustainability of affordable housing in hard to replace rural settlements⁵.
- 3.4 The increased necessity for affordable housing in rural areas due to the small size of the housing market that meets the needs of households⁶, together with limited land availability and some justifiable planning controls in small settlements highlights the requirement to ensure affordable housing is retained, in perpetuity, as much as possible.
- 3.5 The policy objectives behind sections 300 to 302 of the Housing and Regeneration Act 2008 relate to the above issues (paragraph 3.4), ensuring shared ownership houses in such areas where they would be difficult to replace are not subject to the general government aim to enable leaseholders to gain full ownership, rendering the home lost to the affordable housing sector; and to remove the risk of financial loss to all providers due to early enfranchisement.

4. The Regulations and Order

- 4.1 The Regulations and Order apply to England only and are applicable regardless of whether the homes have received grant-funding from the Agency or otherwise.
- 4.2 The Order lists all the areas that are designated as ‘Protected Areas’⁷.
- 4.3 The Regulations specify a requirement for landlords to include in the shared ownership lease, for houses within a ‘Protected Area’, conditions that either:
- restricts the leaseholder’s equity share to a maximum of 80% or
 - ensures that once the leaseholder has acquired 100% share of the house, that when it becomes available for resale that it is sold back to the landlord

5 Policy, procedural and strategic implications

- 5.1 The new regulations provide an environment which is designed to have a positive impact on the provision and retention of shared ownership houses by:
- enabling greater certainty for strategic housing authorities that proposals for shared ownership homes in areas with identified need, where opportunities to build are scarce, can be brought forward without the risk of those homes being lost to the open market
 - enabling greater certainty for providers and lenders that there will no longer be a risk of financial loss due the regulations providing exemption from the risk of early enfranchisement
 - enabling greater choice for households because of a wider range of providers developing shared ownership homes due to the mitigation of the risk from early enfranchisement for all providers
 - enabling an increase in the availability of land due to landowners having greater assurance that the homes will be retained as affordable in perpetuity

⁵ Properties situated in a rural area designated by order of the Secretary of State under section 17(1)(b) (Right to Acquire: Supplementary Provisions) of the Housing Act 1996 are exempt from Right to Acquire. See also Planning Policy Statement 3: Housing.

⁶ See Affordable Rural Housing Commission final report (Goodman Report); Planning Policy Statement 3: Housing; Living Working Countryside: The Taylor Review of Rural Economy and Affordable Housing (Taylor Review)

⁷ See http://www.legislation.gov.uk/ukxi/2009/2098/pdfs/ukxi_20092098_en.pdf

- 5.2 Providers must insert one of the clauses (as per paragraphs 4.3 above) in the shared ownership leases within Protected Areas. The Homes and Communities Agency makes available suite of DPA leases available for providers to use published through the Capital Funding Guide [here](#).
- 5.3 If the provider chooses to allow the leaseholder to acquire 100% equity, there should be a covenant which states that the leaseholder agrees to sell the property back to the provider or the provider's nominee, at market value, if they wish to move.
- 5.4 If the provider is unable to buy back the property an alternative registered provider may be nominated, otherwise the owner will be able to sell on the open market after a specified timescale (usually 6 months).
- 5.5 It is expected that the landlord will be able to buy back the property by using Recycled Capital Grant Funding and/or private finance. If this is not possible, the Agency will positively consider funding the repurchase, as per section 9, Help to Buy: Shared Ownership chapter of the Capital Funding Guide:
- “Where landlords have robustly exhausted all other funding routes, including the use of and or transfer of RCGF, the Agency will positively consider applications for grant to fund the repurchase of shared ownership property where: (i) the property was funded under the Agency’s Protected Areas policy; and (ii) the shared ownership lease granted contained the Agency’s Protected Area fundamental clause obliging the shared owner to sell the property back to the landlord, or the landlord’s nominee.”⁸*
- 5.6 The Agency’s designated protected area policy extends the legislative requirements for retention of houses to also include grant funded flats. This will assist with retention of all new grant-funded shared ownership property in Protected Areas and it will put leaseholders in flats on a similar footing to leaseholders in houses.
- 5.7 The designated Protected Areas that are subject to the Order are coterminous with the rural areas that are already exempt from the Right to Acquire scheme⁹ and areas subject to Rural Exceptions site policy¹⁰, ensuring consistency in the rural housing retention policy.¹¹
- 5.8 The legislation allows further areas to be designated as Protected Areas. Criteria for designating further areas would include availability of land for housing in particular locations and existing available stock; the availability of shared ownership; and the level of identified need¹².
- 5.9 There is no intention to invite applications for further areas to receive Protected Area status at this time
- 5.10 Protected Area status can be removed by the Secretary of State for Communities, if it is no longer required

⁸ See <https://www.gov.uk/guidance/capital-funding-guide/1-help-to-buy-shared-ownership>

⁹ Those areas where Housing Association tenants are not eligible to buy their social rented home at a discount.

¹⁰ See [National Planning Policy Framework](#).

¹¹ This lends both clarity and greater assurance to landowners and providers that properties that are enabled as affordable in perpetuity for households whose needs are not met by the market, will remain so.

¹² This evidence base is available in local authorities’ Strategic Housing Land Availability Assessment and Strategic Housing Market Assessment.

6 Conclusion

6.1 The provisions within the Housing and Regeneration Act 2008 enables:

- the designation by Secretary of State for Communities of Protected Areas to prevent loss of shared ownership homes to the open market where they are difficult to replace
- providers to restrict 'staircasing' as a mechanism to retain shared ownership in the Protected Areas without the risk of financial loss due to early enfranchisement
- all housing providers, not only housing associations, to offer shared ownership leases for houses without the risk of early enfranchisement

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