



Homes &
Communities
Agency

PROCEDURES FOR VARYING GRANT FUNDED SHARED OWNERSHIP LEASES – BACKGROUND INFORMATION

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This guidance is for the attention of:

Grant-funded landlords owning grant-funded shared ownership housing in England outside of greater London. For requests to vary the shared ownership lease inside greater London, please contact the Greater London Authority.

Grant funding includes Housing Association Grant, Social Housing Grant or Social Housing Assistance.

Relevant legislation:

Sections 19(6) of the Housing and Regeneration Act 2008, sections 18, 27 and 27A of the Housing Act 1996, sections 50 and 52 of the Housing Act 1988 and enactments replaced by those sections.

This guidance replaces:

- Tenant Services Authority Circular 03/08: Amendment of procedures for varying shared ownership leases, which the Regulator has archived for information purposes
- Updates the Agency's guidance issued in April 2010
- Updates the Agency's guidance issued in August 2011

1. **Applicability**

- 1.1 This guidance is intended for grant-funded landlords owning or planning to provide grant-funded shared ownership housing in England.
- 1.2 It does not change the arrangements for landlords receiving grants under section 27A of the Housing Act 1996, or unregistered bodies receiving funding under section 19(6) of the Housing and Regeneration Act 2008 (unless they become Registered Providers, in which case they will be subject to the same requirements as existing Registered Providers). However, their shared ownership stock would become subject to these arrangements if it transferred to a Registered Provider.

2. **Summary**

- 2.1 The Homes and Communities Agency (the Agency) no longer relies on a restriction on title with the Land Registry to protect its fundamental clauses in grant-funded shared ownership leases. The Agency's fundamental clauses are covered in detail in the Capital Funding Guide Help to Buy: Shared Ownership chapter [sections 5.2 to 5.2.7](#). The Agency relies on compliance with its contractual funding conditions, and its published requirements and guidance. Failure to comply in this manner might lead to repayment of grant.
- 2.2 Instead of seeking the Agency's consent to vary any of the terms within a shared ownership lease, landlords should in future seek the Agency's consent only if they wish to vary one of the fundamental clauses. It is anticipated that consent to vary will be requested only in exceptional cases. Variation of a fundamental clause without the Agency's explicit consent may result in a requirement for repayment of grant.
- 2.3 Shared ownership schemes not funded by grant and which are not included in the Agency's programmes are not covered by this guidance or the Agency's wider grant funding requirements.
- 2.4 Shared ownership properties in which the former shared owner has staircased to full ownership are outside the scope of this document and landlords do not require Agency consent to vary those leases.
- 2.5 This consent is completely distinct from, and does not affect, the restriction on a landlord's own title that requires it to obtain section 172 consent from the Social Housing Regulator before disposing of property.

3. **Background**

- 3.1 It is a condition of grant for Help to Buy: Shared Ownership and Social HomeBuy on a shared ownership basis that landlords include the Agency's fundamental clauses in their shared ownership leases. These relate to staircasing, mortgagee protection, rent setting, repurchase and other matters. These fundamental clauses ensure that the property continues to offer shared ownership, the purpose for which grant was paid and applied since the inception of grant-funded shared ownership. Historically there was a requirement to lodge at the Land Registry a restriction on title in favour of the Agency's predecessor body - the Housing Corporation. That restriction prevented any variation of the terms of the lease without the Corporation's prior written consent.

- 3.2 The restriction on title had the intended effect of preventing any undesirable variation of the fundamental terms of a shared ownership lease. Unfortunately, it had side effects which led to considerable and unnecessary administrative work; and for landlords and shared owners some expense. For example:
- The restriction required all variations to be approved, even those which did not affect the fundamental clauses
 - Many urgent requests for consent to do things did not actually involve any variation of the terms of the lease
 - Requests for consent to remove the restriction when the parties omitted to do so at the time of final staircasing
 - Various legal and other notifications arrived simply because the Corporation's name appeared on the title
- 3.3 Grant Funding Conditions had always required the Agency's fundamental clauses to be included in shared ownership leases, and it was not expected that requests to vary these clauses would increase.

4. Procedural Change

- 4.1 Having concluded that the volume of unnecessary requests was too high to justify the existing regime, it was decided to regulate variations by means of compliance with grant funding conditions which had the potential sanction of grant recovery. The clause requiring a restriction to be registered at the Land Registry was removed from the Agency's model leases in October 2008. [Sections 5.2.6 to 5.2.7](#) of the Help to Buy: Shared Ownership chapter of the Capital Funding Guide explain the background and revised procedures.

5. Restrictions that remain on title

- 5.1 Since October 2008, Land Registry has instructed its local offices not to register new restrictions, even when the lease is in an old form that contains a request.
- 5.2 Also from that date, the Land Registry began to identify and remove from the register all existing restrictions on title. Landlords were not required to take any action in removing existing restrictions.
- 5.3 The Land Registry process of removing existing restrictions may not have picked them all up, for example if they had departed from the standard wording or were combined with other restrictions.
- 5.4 If a restriction is subsequently found to have remained on title, and a variation of the terms of the lease is planned (whether to a fundamental clause or any other), if it seems in order, the Agency will give the necessary consent and recommend that the landlord apply on form RX3 to the Land Registry to cancel the restriction. It is not necessary for the Agency to approve or join in such applications.
- 5.5 If assignees' solicitors or lenders should ask why the lease calls for a restriction to be registered but none actually appears on title, the Land Registry should advise enquirers of the existence of the withdrawn Housing Corporation Circular 03/08 and the Agency's formal application, as the body with the benefit of the restriction, to withdraw existing restrictions.

6. Protecting the fundamental clauses through the contractual funding conditions and potential grant recovery

- 6.1 A landlord wishing to instigate or join in any variation of a fundamental clause should seek the Agency's agreement. This applies to all grant-funded property sold under shared ownership leases since the inception of shared ownership. Landlords must firstly refer to Sections 5.2 to 5.2.7 of the Help to Buy: Shared Ownership Chapter of the Agency's Capital Funding Guide (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>) before approaching the Agency in writing as required.
- 6.2 Grant includes Housing Association Grant, Social Housing Grant and Social Housing Assistance including that paid via local authorities as well as the Agency's predecessor body – the Housing Corporation, and on properties sold on shared ownership terms through the predecessor brand names such as HomeBuy Shared Ownership and Social HomeBuy together with previous grant-funded shared ownership products.
- 6.3 Although this guidance predominantly refers to existing leases, similar considerations apply to leases being drafted for grant-funded shared ownership schemes in development. Any proposal to vary a fundamental clause that is not approved by the Agency could jeopardise continued payment of grant or result in recovery of interim payments of grant where already paid.

7. Requests for agreement to vary fundamental clauses in the leases.

- 7.1 It was not the intention to make varying a fundamental clause any more difficult. Such clauses, by definition, are considered important, and grant funding conditions require that they continue to be included in all grant-funded shared ownership leases. The Agency receives very few requests to vary fundamental clauses, which usually reflect exceptional circumstances. As indicated above it is the process that has changed, not the policy.
- 7.2 The Agency will generally agree to amendments to correct errors in expressing the fundamental clauses in the first place.
- 7.3 The Agency will generally agree to variations that become necessary as a consequence of new legislative or regulatory requirements.
- 7.4 In other circumstances:

(a) New clauses that will affect the fundamental clauses.

The Agency's agreement is required for the introduction of any new clauses into a lease which would have the effect of varying, diminishing or negating the effect of the pre-existing fundamental clauses.

(b) Alienation

The Agency will not normally agree to a variation that diminishes the effect of the non-alienation clauses. The Capital Funding Guide describes exceptional circumstances in which a landlord may agree to sub-letting without actually varying the lease – please follow the link and go to section 5.3.21

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

(c) Mortgagee protection

The Agency will not normally agree to variations that diminishes the effect of the Mortgagee Protection Clause. If exceptionally the Agency consider there are good reasons to vary this clause it will require the agreement of the mortgagee.

The Agency is generally in favour of adding a mortgagee protection clause to older leases where one does not currently exist, as this improves mortgageability. Although this varies the lease, the addition does not actually vary an existing fundamental clause. Therefore the Agency does not need to agree to the insertion of a mortgagee protection clause provided the Agency's own clause as worded in its model lease is replicated without variation.

(d) Staircasing

The Agency will not normally agree to variations that fetter, restrict or prevent a shared owner from staircasing in the ways permitted in Agency's Capital Funding Guide, Help to Buy: Shared Ownership chapter (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>), or allowed by legislation.

(e) Rent review

The Agency will not normally agree to variations that conflict with its policy on rent review, such as the limit on the amount of rent increases, set out in the section 4 of the Help to Buy: Shared Ownership chapter of the Capital Funding Guide (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>).

(f) Right of first refusal (pre-emption clause)

The Agency will not normally agree to variations that diminish the effect of this clause, or which curtail or extend the pre-emption period.

(g) Clawback provisions for key workers

The Agency's model leases no longer contain a clawback clause. The Capital Funding Guide explains that shared owners and landlords are no longer required to adhere to this clause where it is contained in existing leases. Should the existence of the clause cause concern to a prospective purchaser in relation to an assignment, the Agency recommends use of its published pro forma deed of variation as per section 7.7 of the Help to Buy: Shared Ownership chapter in the Capital Funding Guide (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>).

Removing the clawback clause by using the Agency's pro forma variation does not require Agency approval. Removing the clause in other ways does require approval or could lead to grant recovery. A pro forma for providers to use to effect the removal of this clause is available on through [section 11](#) of the Help to Buy: Shared Ownership chapter.

(h) Service charges

Although still a funding requirement where applicable, since 22 October 2010 service charge clauses are no longer classified as fundamental i.e. the wording in the Agency's model lease is no longer compulsory. For leases issued before this date there is no longer a requirement to seek Agency consent to vary this clauses provided it meets the Agency's terms and conditions as set out in the Capital Funding Guide Help to Buy: Shared Ownership chapter (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>).

Issues that could impinge on fundamental clauses

(i) Surrender and re-assignment

This is not usually necessary during the period of shared ownership. If it occurs, the fundamental clauses should be repeated in the replacement lease. The Agency will not normally expect a lease to be shortened.

(j) Lease extensions

These are not usually necessary during the period of shared ownership but might improve the mortgageability of older leases. The Agency will not object to extensions in such circumstances. The term of the lease, although a condition of grant, is not actually a fundamental clause. There is no requirement to seek agreement for a lease extension, unless the deed affects other clauses that are fundamental. However, landlords must satisfy themselves whether or not a lease extension is governed by the Social Housing Regulator's consent to dispose regime and seek appropriate consent as appropriate from the Regulator.

8. How to request Agency agreement to vary a lease without incurring grant recovery

- 8.1 Landlords should first consider if grant recovery might be an issue when it consults the shared owner on the specific variation. It may be that the approach for a variation is instigated by the shared owner or that there has been prior discussion. In other circumstances landlords might wish to obtain Agency guidance or agreement before approaching the shared owner, so as not to raise expectations or cause concern.
- 8.2 Having considered the requirements in the Agency's Capital Funding Guide Help to Buy: Shared Ownership chapter (please see <https://www.gov.uk/guidance/capital-funding-guide-hca/1-help-to-buy-shared-ownership>), and the contents of this guidance document, landlords should email the Agency's Programmes and Policy team (Homebuy@hca.gsi.gov.uk) setting out the following information:
- whether the variation is to a draft lease or an existing one
 - address of the property
 - parties to the lease and date of the lease (please set out any name changes, mergers etc. from the original landlord)
 - amount of grant attributable to the property
 - Agency references relating to the grant, for example a scheme number

- name of the landlord that received grant (i.e. the original lessor) if appropriate
- the relevant fundamental clause to be varied, or affected
- a full explanation of the proposed variation
- a draft deed of rectification or variation showing track changes
- the reason for the variation and
- implications if the variation was not to be approved

8.3 The Agency will reply by e-mail.

9. If the Agency does not agree with the proposed variation of a fundamental clause

9.1 If the Agency cannot agree a proposed variation, the Agency will reply by e-mail setting out its concerns and indicate whether there is scope for making the amendment acceptable in a different form.

9.2 If, despite the Agency's refusal, a landlord proceeds with the variation, it will be a breach of Contractual Funding Conditions which could incur penalties, such as grant repayment.

10. Suggestions for Landlords

10.1 The Agency considers that the number of occasions when varying a fundamental clause in a grant-funded shared ownership lease would be appropriate are likely to be infrequent, Therefore landlords may wish to consider adopting the following internal processes:

- ensuring relevant staff understand which clauses are fundamental
- nominating staff responsible for preparing requests for the Agency to approve variations and who will obtain necessary internal clearance
- ensuring nominated staff as above are aware that variation of fundamental clauses without Agency approval risks incurring penalties such as grant repayment
- ensuring that full details as per section 8 above are provided to or discussed with the Agency as soon as possible which should allow the variation process to progress without undue delay, especially where leaseholders are waiting to sell or buy a property
- ensuring their legal representatives are aware of the Agency's requirements and this guidance

11. Enquiries

11.1 Any enquiries about this guidance or lease variations should be addressed to the Agency's Programmes and Policy team (Homebuy@hca.gsi.gov.uk).