

Agreement to vary shared ownership leases

Landlords' information

- 1 This leaflet advises housing association staff and their legal advisers about obtaining the Corporation'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 Housing Corporation. 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 Corporation's Capital Funding Guide found at www.housingcorp.gov.uk 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 Corporation'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 Corporation's agreement to this. Until 2008, the 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 Corporation 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 first obtain the agreement of the Corporation's Regional Investment Team for the area in which the property is situated. Note that Corporation agreement is required for variations of **fundamental** clauses only. The nature of this agreement is that the Corporation, 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 Corporation but taking account of any requirements of other parties, such as lenders. Circular 03/08 sets out a procedure. The Corporation expects that the contents of that Circular will eventually be

absorbed into the Capital Funding Guide and be administered by the Homes and Communities Agency.

Older leases with restrictions remaining on title

5 Along with the publication of Circular 03/08, the Corporation introduced new sample leases which omit the requirement to place a restriction on title. So there will be no new restrictions. The Corporation 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 Corporation 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 Corporation'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 Corporation 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 Corporation'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 Corporation that is not required.

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

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- 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 Corporation's Regional Investment Team under the procedure in section 5 sub-paragraph 4 of Circular 03/08.

- 10 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.
- 11 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.
- 12 The Corporation 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, 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 Corporation 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 Corporation's only remaining interest in variations is likely to be in the landlord's continuing right of first refusal.
- 13 If you have any questions about consent to vary terms of the lease, please contact the Regional Investment Team of the Housing Corporation (or, before 1 November 2008, the Corporation's Regulation Policy Section at Maple House, 149 Tottenham Court Road, London W1T 7BN (020 7393 2172).

The Housing Corporation, October 2008