

Bath & North East Somerset Council

MEETING/ DECISION MAKER:	Development Control Committee	
MEETING/ DECISION DATE:	11 December 2013	EXECUTIVE FORWARD PLAN REFERENCE:
TITLE:	Mortgagee In Possession Clauses for Affordable Housing Delivery	
WARD:	All	
AN OPEN PUBLIC ITEM		
List of attachments to this report: Appendix 1: Example Mortgagee in Possession Clauses		

1 THE ISSUE

- 1.1 Housing Associations need to go to the private finance market to borrow funds to deliver new affordable homes. In recent years lenders have become increasingly risk adverse and require comfort that they will be able to repossess homes built for affordable housing and sell these on, unfettered by restrictions on valuation / occupancy in order to recoup unpaid debt. Without an appropriately worded Mortgagee in Possession (MIP) clause in a Planning Deed entered into in pursuance of Section 106 of the Town and Country Planning Act 1990 (S106 Deed), borrowing for affordable housing is at best expensive or at worse not possible. This has become a standard issue for the housing sector and the Council's current case by case approach to agreeing and implementing an MIP clause is inefficient and time consuming. Members are now being asked to approve a new approach to MIP clauses.
- 1.2 A MIP clause will fulfil the current requirements of lenders of funding for affordable housing development, and will recognise the changes in the financial climate since the Development Control Committee's previous decision regarding MIP clauses in S106 Deeds taken on 21 January 2003.

2 RECOMMENDATION

- 2.1 The Development Control Committee is asked to agree that all the Council's S106 Deeds with affordable housing requirements shall include, as standard practice, an appropriate MIP clause. The MIP clause will fulfil the requirements of lenders of funding for affordable housing development and will be negotiated with the developer as part of wider S106 discussions.

3 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

- 3.1 Delegated authority from the Development Control Committee to officers has been in place since January 2003 so that officers may approve a request for a MIP clause to a specific housing association subject to the testing undertaken as follows. Current arrangements allow for the development of a MIP clause in a completed S106 Deed in favour of a specified housing association on a scheme by scheme basis. A process has evolved whereby, on a scheme by scheme basis, the housing association submits to the Council a financial justification and evidence from lenders that housing finance will not be forthcoming without an appropriately worded MIP clause. This justification is scrutinised and approved by Housing, Planning and Legal Services and is followed by the bespoke development of MIP clause wording to be inserted in the S106 Deed or such supplemental deed to it. The Council's direct legal costs for this work are largely paid for by the developer or the housing association, but the time consideration to bring forward an appropriate MIP clause can be significant.
- 3.2 As an example, the legal costs borne by one of the Council's housing association partners to agree the supplemental S106 Deed and its MIP clause for a recent development was £1,200. In addition to this quantifiable sum, many hours of housing association officer and Housing Services time were required to ensure that the S106 Deed was agreed and signed. The timescale involved in agreeing the S106 Deed (which can take many months) has in some instances caused delays in individual shared ownership affordable housing purchases, generating additional costs to the housing association.
- 3.3 The development of a standard affordable housing MIP clause for inclusion in the S106 Deed at the time of its initial negotiation will make significant time savings for Council officers as well as a financial saving for the Council's housing association partners.

4 STATUTORY CONSIDERATIONS AND BASIS FOR PROPOSAL

- 4.1 Under the Town and Country Planning Act 1990 (as amended) any person interested in land in area of the Council may enter into a S106 Deed to provide a planning obligation. The planning obligation may in cases ensure the delivery of affordable housing in a development in conjunction with the grant of planning permission. The Council is free to enter into a S106 Deed by agreement as it thinks fit subject to the normal public law constraints of it acting reasonably and Regulation 122 of the Community Infrastructure Levy Regulations 2010. The planning obligation is enforceable by the Council against the person entering into the obligation and against any person deriving title from that person unless otherwise provided by the terms of the S106 Deed.

5 THE REPORT

- To obtain the funding for the development of new affordable homes, housing associations have to charge their housing stock as security to the lender. This is done in a very similar way to an individual taking out a mortgage to fund a property purchase, with the value of the property a key issue in the lending available and the cost of the borrowing. To ensure there is adequate security in place for the loan, housing associations are required to have security cover covenants that are based on the Existing Use Value – Social

Housing (EUV - SH) or the Market Value – Subject to Tenancy (MV-ST) of the properties being borrowed against where:

- Existing Use Value – Social Housing (EUV-SH). This is effectively the net present value of the net cash flows from a property assuming it stays as social housing in perpetuity.
- Market Value – Subject to Tenancy (MV-ST). This is effectively the net present value of the net cash flows from a property for the average expected life of the current tenancy, followed by an open market disposal or rent at the end of that tenancy

5.1 Lenders will currently allow a housing association to borrow more against the MV-ST value, but MV-ST values *cannot* be applied if the S106 Deed has restrictions on tenure which are not mitigated by a MIP clause, or if the MIP clause is too restrictive. The key point here is that if a housing association can only apply EUV-SH values, on the average housing association property investors will lend approximately £25,000 per property **less** than if the association could borrow against the MV-ST value. If MV-ST values cannot be applied due to the fact that the S106 Deed restrictions on tenure are not mitigated, or if the MIP clause is too restrictive, the housing association's ability to develop erodes as they need to borrow more, on average, than the EUV-SH valuation would allow against each new property in order to maintain and fund current levels of development activity.

5.2 If the MV-ST value can be applied, the housing association can borrow on average £25,000 per unit more than the restricted EUV-SH valuation against each new property developed and the ability to continue developing at current levels can be maintained. With falling public grant levels this ability to maximise borrowing is going to become more critical, and many housing association boards are considering whether they can justify development activity in areas that do not have a satisfactory, flexible MIP clause included in S106 Deeds.

5.3 In terms of developing a standard MIP clause, based on current funding criteria, the following guidelines should apply:

- A MIP and their successors in title must be able to dispose of a property free from the affordable housing provisions of the S106 Deed.
- It is acceptable that a MIP is first required to transfer the properties to a buyer who will take them still subject to the S106 Deed, or allow time for the LA to instigate such a transfer. However,
 - the MIP must not be required to make such a transfer for a consideration less than the amount required to redeem its lending against the properties and
 - there must be a time cap on the length of time a MIP is required to wait for such a transfer to be found and completed. Advice from the Council's housing association partners' solicitors suggests this needs to be a maximum of 3 months from when the lender notifies the Council that it is taking action under the charge to the point where it is able to sell free of restrictions, this is in order to satisfy lenders.

5.4 In order to present accurate and up to date information on the issue of MIP clauses, the views have been sought of all of the Council's current housing association partners and neighbouring Unitary Authorities. This report has been derived using information provided by Curo, Sovereign HA, Guinness Hermitage, Knightstone HA with additional input from their key developer and legal partners.

6 RATIONALE

6.1 In January 2003, Development Control Committee resolved to give delegated authority to the Head of Housing and Supported Living, in consultation with the Head of Planning Services and the Planning and Environmental Law Manager, to approve the use of MIP clauses in S106 Deeds in favour of Registered Social Landlord mortgagees, specifically where the Head of Housing and Supported Living is satisfied that the housing association will not be able to obtain acceptable funding for an affordable housing scheme without the release of occupancy restrictions. (Development Control Committee, Tuesday 21st January 2003 minute 42)

6.2 Evidence from the Council's housing association partners demonstrates that the inclusion of an appropriately worded MIP clause, suited to the current funding climate, will always be essential if they are to continue to develop affordable homes in the District.

6.3 The cost and time taken to fulfil the current arrangements is onerous to both the Council and its housing association partners.

6.4 Current changes within the Council's legal services, with the recent retirement of the Planning and Environmental Law Manager, have raised concerns with the ability of the Council to deal with requests for MIP clauses from the housing associations in a timely and efficient manner.

6.5 The inclusion of an appropriately worded MIP clause in all relevant s106 agreements, to help support and maximise housing association borrowing as well as support the mortgage-ability of low cost home ownership initiatives, will enable the Council to continue to support a healthy development programme of affordable homes in the District.

7 OTHER OPTIONS CONSIDERED

7.1 The Council could look at retaining the current approach that provided a developer has a housing association identified includes, after testing, a MIP clause in a S106 Deed or adds a MIP clause retrospectively to an approved S106 Deed. The process to bring this forward could be simplified and streamlined by seeking a delegated authority for the terms of the MIP clause to be approved by Housing Services without a requirement for scheme by scheme justification and without significant recourse to legal planning advice and internal approvals.

7.2 However, given that the MIP issues behind housing association borrowing requirements are now experienced across the whole sector, any process that

includes an element of additional or bespoke work seems an excessive approach to one which can be streamlined even further.

8 CONSULTATION

- 8.1 All housing association partners actively developing, or hoping to develop, new affordable homes in the District were asked to evidence the requirement for MIP clauses and express their thoughts on how current processes could be improved. Responses were received from Curo, Guinness Hermitage, Sovereign HA and Knightstone HA, as well as their developer partners.
- 8.2 Discussions have been held with our West of England Housing Enabling colleagues to learn from their experiences of allowing, as standard, the use of MIP clauses that support housing association borrowing, as well as with Planning & Housing Authorities further afield who are implementing such clauses for the first time.

9 RISK MANAGEMENT

- 9.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Council's decision making risk management guidance.
- 9.2 Members should note that, in terms of the borrowing by a housing association, the MIP clause would only be invoked as a last resort when an organisation defaults on its loans and the lender seeks repossession. This has never happened to a housing association; therefore the possibility of affordable housing being taken out of the sector by a lender is remote.

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Background papers	<p><i>Consultation responses from Housing Association Partners</i></p> <p><i>Example mortgagee in possession clauses – South Gloucestershire Council, North Somerset Council, Exmoor National Park Authority CML</i></p> <p><i>CML briefing: Section 106 planning agreements and low cost home ownership lending</i> http://www.homesandcommunities.co.uk/sites/default/files/section106_briefing_note_cml.pdf</p>
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Example Mortgagee in Possession Clauses

Simple MIP clause with no moratorium element:

- 1 Notwithstanding any other provision of this Agreement the covenants and obligations on the part of the Owner/Developer contained in this Agreement shall not be binding upon
 - 1.1 any mortgagee or chargee in possession of the Affordable Housing Land or any part thereof or any Affordable Dwelling or any receiver or manager (including administrative receiver) duly appointed by any such mortgagee or chargee to the intent that any such mortgagee or chargee or receiver may deal with or dispose of the Affordable Land or any part thereof and/or the Affordable Dwelling free from the covenants and obligations set out in this Agreement and that any successors in title shall not be bound by it and
 - 1.2 any Affordable Dwelling in respect of which a tenant exercises any statutory Right to Acquire or Right to Buy or any Shared Ownership Unit in respect of which the lessee shall have staircased to 100% equity share and (in either case) the tenant or lessee (as the case may be) acquires a freehold or long leasehold interest in the same so that such tenant or lessee shall be entitled to dispose of such Affordable Dwelling thereafter free from the covenants and obligations set out in this Agreement and that any person deriving title through or under such tenant or lessee or any other successor in title shall not be bound by it

MIP Clause with 3 month moratorium:

None of the provisions of this Agreement relating to any of the Affordable Housing Units shall be binding upon a mortgagee in possession of one or more of the Affordable Housing Units which said mortgagee in possession may sell and dispose of any Affordable Housing Unit free from the terms of this Agreement and upon such sale as aforesaid this Agreement shall become null and void in respect of that Affordable Housing Unit and nor shall the terms of this Agreement be binding upon any receiver appointed by such mortgagee in possession of any Affordable Housing Unit SUBJECT TO the said mortgagee in possession first using its reasonable endeavours for a period of 3 (three) months to sell and transfer the Affordable Housing Unit to an alternative Registered Provider first approved in writing by the Council's Strategic Director of Planning and Customer Services such approval not to be unreasonably withheld or delayed PROVIDED ALSO that the said mortgagee shall not be obliged to sell or convey to an alternative Registered Provider under this clause for a consideration less than that which the mortgagee requires to either

- (i) redeem its borrowing upon the Affordable Housing Unit plus provide for its reasonable costs

or

- (ii) that which the mortgagee could obtain on the open market whichever is the greater

The Owners shall notify the Council's Strategic Director of [Planning and Customer Services] in writing within seven days of receipt of actual notice of any breach or alleged breach of any term contained in any mortgage or legal charge of all or any of the Affordable Housing Units affecting the Land