



Report To: Planning Committee
Lead Officer: Director - New Communities & Planning

4 November 2015

Application to Vary Section 106 Agreement to Include a Mortgagee in Possession Clause – Newton Road, Whittlesford

Purpose

1. Members are asked to consider the modification of a planning obligation linked to planning permission S/0761/14/FL for development at Newton Road, Whittlesford to include a 'Mortgagee in Possession' (MiP) clause into the current S106 agreement, to enable the Registered Provider to borrow against the development and so fund future schemes in its programme. This planning decision is brought to Members' attention, as it is a departure from national and local policy that affordable housing should be provided on rural exception sites in perpetuity, and so must be made as an exception to policy, with details only being delegated to officers to resolve.

Recommendation

2. It is recommended that Planning Committee approves the request to vary the S106 agreement for application S/0761/14/FL at 22 Newton Road for the inclusion of a Mortgagee in Possession clause and delegates to officers agreement on the detailed wording, subject to no significant objections from the parish or local members and, in the event of mortgage default, the Council is offered first option to purchase at no less favourable terms and valuation than is sufficient to defray the funder's exposure.
3. The reason for the recommendation is to enable the benefits of the MiP clause to the Registered Provide (RP) to fund its social housing programme, but also to allow the Council to intervene to support its policy of affordable housing in perpetuity, should the RP default on its mortgage.

Considerations

4. Planning permission with a planning obligation was granted under delegated approval in March 2015 for the 'Erection of 8 Affordable Dwellings including Associated External Works and Roadways' at land adjacent to 22 Newton Road, Whittlesford. The planning obligation contained a requirement that the affordable housing will be provided in perpetuity. Details of the proposal, consultations and its impacts are available on the Council's planning web pages under reference S/0761/14/FL and are set out in the officer's report.
5. The planning application was made under the name of the builder, Cocksedge Ltd., for the Cambridge Housing Society, which is the Registered Provider (RP) that has taken control of the land Work has started on site and so the permission has been implemented. The RP, however, has requested agreement of the Council to vary the existing S106 agreement to include a MiP. A supporting letter is attached as Appendix A, setting out the financial reasons for the RP to require a MiP clause to ensure funding viability.

6. Under S106A of the Town & Country Planning Act 1990, formal applications to vary an agreement can only be made after 5 years from exchange, but a Local Planning Authority may vary by agreement at any time, but following the same approach as is set out in S106A.
7. Should the Council accord to this request, then it would be as an exception to planning policy, which currently requires the provision of affordable housing 'in perpetuity', whereas a MiP clause allows for a third-party funder to take possession and sell a property, should the RP default or fail to meet its obligations on its mortgage loan facility. The reason given for the requested modification is that it enables the loan facility against a development to assist in forward funding future schemes by the RP and indeed to bring forward viable development on the current site.
8. The site was promoted as a rural exception site, where the NPPF states that there is a presumption in favour of sustainable development including the delivery of affordable housing. As an exception to the normal policy of restraint to development in the countryside, by policy HG/5, schemes of 100% affordable housing designed to meet identified local housing needs on small sites within or adjoining villages may be supported as an exception to policy providing it meets a series of criteria, including that 'the development proposal includes secure arrangements for ensuring that all the dwellings within the scheme provide affordable housing in perpetuity for those in housing need'. The Council agreed that the requirements of HG/5 were met and, having regard to all other material considerations, planning permission should be granted for the development as a rural exception site accompanied by a planning obligation by which the affordable housing would be retained in perpetuity.
9. If the Council now agrees to a MiP clause, it can only do so as exception to policy, as it would conflict with policy HG/5 (and indeed a departure from the NPPF and the Council's emerging policy concerning rural exception sites). The requirements of the development plan policy HG/5 (and any departure from it) should be given considerable weight. Planning permission without provision for affordable homes to be retained in perpetuity should only be granted on a rural exception site if there are material considerations which justify a departure from policy.

Balance of Material Considerations

10. Refusal of the request to vary the S106 agreement would ensure that the affordable housing provided will be retained in perpetuity. However, the financial circumstances of the RP developer, in the context of a rural exception site being part of funding a wider programme social housing, is a material consideration, as it affects the viability and the delivery of the scheme. The present planning obligation affecting the site, without an MiP clause, is inhibiting the borrowing capacity of the RP and therefore affects the ability of the RP to deliver a wider programme of affordable housing in the District and elsewhere to the detriment of the Council's strategy and expectations to deliver more affordable homes to meet a substantial need. Grant funding for registered providers has significantly reduced over the last few years and there is an expectation by Government that registered providers should maximise their borrowing power by using their housing assets as security for additional borrowing through private finance to deliver new affordable homes. An MiP clause allows registered providers to secure funding in this way. Moreover, the RP has indicated that without the MiP clause the development on the present site will be rendered unviable and may not proceed to completion despite the fact it has commenced. Other RPs have

made similar comments to the Council in respect of other rural exception sites. Officers are satisfied that these are valid and weighty material considerations which justify modification of the planning obligation here to include an MiP clause. Members may wish to note that in law personal and individual financial circumstances are capable of being material planning considerations and therefore also relevant to the merits of a modification to a planning obligation.

11. It should be recognised that, in practical terms, the risk of mortgage default by an RP is small, as the regulatory regime under which an RP operates contains many checks and balances, with the sanction of merger of an RP in financial difficulties with a larger, more financially sound one, most commonly used in the past. As a result, there are no occasions known to officers whereby an RP has been forced to cede possession of properties to a finance company, following default on its mortgage. Even so, the Council could insist on its own power to intervene with provision within the MiP clause for it to have first refusal to purchase on no less favourable terms than that of the funder. This would ensure that the funder's terms may be met, but that the Council's policy of affordable housing in perpetuity may also be supported, in the unlikely event of a mortgage default. Officers consider that a provision to give the Council first refusal in the event of default is proportionate and reasonable and officers advise that any amendment to the planning obligation to include an MiP clause should include provision to this effect.
12. Given the scope of the extant planning permission, as described in paragraph 4 of this report, members should be aware that any invocation of the MiP clause, that ultimately results in an open market disposal of the affected units free of affordable housing restrictions, will take those properties outside the authorisation of the existing permission. The breach of planning control that would then ensue would need to be addressed by securing an alternative approval for use as unfettered market housing; this decision would then be a material condition in the assessment of such future application. Accordingly, to agree the course recommended by this report, members should be satisfied that varying the planning obligations as now sought is an appropriate exercise of discretion in the circumstances.
13. Members may also be aware of the changing national policy situation, with the Government's expressed intentions to extend definitions of affordable housing to include starter homes, at discounted market value for five years only. While the policy context is more fluid, this should be set aside as a consideration, as it can be given no weight until it becomes enacted as regulation or policy.

Conclusion

14. On the balance of the above considerations, Members are recommended to approve the request for modification of the existing planning obligation through inclusion of an MiP clause in the Section 106 agreement, as an individual exception to planning policy, but with the proviso that the Council has first option to purchase on terms no less favourable than the funder, in the event of default on a mortgage, or loan facility.

Background Papers

APPENDIX A: - Letter from CHS to Julie Fletcher, 6 August 2015

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