

# Agenda Item 13a

## SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

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**REPORT TO:** Planning Committee

2 December 2015

**AUTHOR/S:** Planning and New Communities Director

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**S/2341/14/FL - Section 106 Agreement to Include a Mortgagee in Possession Clause –  
Erection of 12 semi-detached affordable dwellings and associated works at Land to  
the North of Daniels Close, Willingham.**

### **Purpose**

1. Planning application S/2341/14/FL was referred to Planning Committee on 1 April 2015 and the Committee gave officers delegated powers to approve the application subject to a Section 106 legal agreement securing affordable housing amongst other obligations.
2. Members are now being asked to consider the inclusion of a 'Mortgagee in Possession' (MiP) clause into the proposed 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.
3. As the development has now commenced, members are also being asked to consider an updated list of conditions further to those agreed by Planning Committee on 1 April 2015.

### **Recommendation**

4. It is recommended that Planning Committee approves the request to insert the MiP clause into the S106 agreement for application S/2341/14/FL at Daniels Close 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.
5. The reason for the recommendation is to enable the benefits of the MiP clause to the Registered Provider (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**

6. Planning application S/2341/14/FL was referred to Planning Committee on 1 April 2015 and the Committee gave officers delegated powers to approve the application subject to a S106 legal agreement securing affordable housing amongst other obligations. 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/2341/14/FL and are set out in the officer's report.

7. Since this application was taken to Planning Committee in April, the developer has found and appointed Cambridge Housing Society (CHS) as the Registered Provider (RP) for this scheme. CHS, however, has requested agreement of the Council to vary the existing S106 agreement to include a MiP clause. A supporting email is attached as Appendix A, setting out the financial reasons for the RP to require a MiP clause to ensure funding viability.
8. 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.
9. The site is 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.
10. 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**

11. 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 policy position without a 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. A 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.

12. Officers are satisfied that these are valid and weighty material considerations which justify modification of the planning obligation here to include a 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.
13. 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.
14. 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 the planning obligation should include provision to this effect.
15. 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**

16. 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.
17. As the development has now commenced officers also recommend that the planning conditions previously agreed in April 2015 be updated as follows:
  - a) **The development hereby permitted shall be carried out in accordance with the following approved plans: EDG/14/62/40 (Date stamped 13 July 2015), EDF/14/62/1 (Date stamped 26 September 2014), EDG/14/62/11/a (Date stamped 29 January 2015), EDG/14/62/55 (Date stamped 29 January 2015) and 1353-01 (Surface Water Drainage Layout).**  
(Reason - To facilitate any future application to the Local Planning Authority under Section 73 of the Town and Country Planning Act 1990.)
  - b) **The materials to be used in the construction of the external surfaces of the buildings, hereby permitted, shall be Hansen Village Harvest Multi (bricks) and Sandtoft Grey Pantile (tiles).**  
(Reason - To ensure the appearance of the development is satisfactory in accordance with Policy DP/2 of the adopted Local Development Framework 2007.)

- c) The development shall be carried out in accordance with the Soft Landscape Specification by Trees in Planning Ltd, dated May 2015 and drawings TIP15 171.1T and TIP15 171.2.**  
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies DP/2, NE/6 and SF/10 of the adopted Local Development Framework 2007.)
- d) Prior to the first occupation of any part of the development, a scheme of hard landscaping shall be submitted to and approved by the Local Planning Authority. The development shall be carried out in accordance with the approved hard landscaping scheme.**  
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies DP/2, NE/6 and SF/10 of the adopted Local Development Framework 2007.)
- e) All hard and soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with a programme agreed in writing with the Local Planning Authority. If within a period of five years from the date of the planting, or replacement planting, any tree or plant is removed, uprooted or destroyed or dies, another tree or plant of the same species and size as that originally planted shall be planted at the same place, unless the Local Planning Authority gives its written consent to any variation.**  
(Reason - To ensure the development is satisfactorily assimilated into the area and enhances biodiversity in accordance with Policies DP/2 and NE/6 of the adopted Local Development Framework 2007.)
- f) The development shall be carried out in accordance with the drainage scheme detailed in drawing 1353-01 (Surface Water Drainage Layout) and constructed and completed prior to the occupation of any part of the development.**  
(Reason - To ensure a satisfactory method of surface water drainage and to prevent the increased risk of flooding in accordance with Policies DP/1 and NE/11 of the adopted Local Development Framework 2007.)
- g) The street lighting shall be carried out in accordance with drawing EDG/14/62/40 with street columns to replicate the height and appearance of the existing street lighting in Daniels Close, Willingham. The approved street lighting shall be installed prior to occupation of any part of the development.**  
(Reason - To provide sufficient lighting for the safety and security of residents and that such lighting does not cause undue light pollution to comply with Policies DP/2 and NE/14 of the adopted Local Development Framework 2007.)
- h) During the period of construction, no power operated machinery shall be operated on the site before 0800 hours and after 1800 hours on weekdays and 1300 hours on Saturdays, nor at any time on Sundays and Bank Holidays, unless otherwise previously agreed in writing with the Local Planning Authority.**  
(Reason - To minimise noise disturbance for adjoining residents in accordance with Policy NE/15 of the adopted Local Development Framework 2007.)

## **Background Papers**

APPENDIX A: - Email from applicant's agent to Andrew Winter, 29 October 2015

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## Appendix A

### Agent's justification for MiP Clause - Daniels Close, Willingham

The Registered Provider of Social Housing for this scheme is the Cambridge Housing Society ("CHS"), who require a MIP clause for the reasons set out below.

In common with all Registered Providers, CHS rely heavily on borrowing from the private finance market to finance the delivery of new affordable housing; this situation will continue for the foreseeable future in view of pressures on public sector finance.

In order to raise money to provide new affordable housing, CHS must provide adequate security using its housing stock. The reliance on the private finance market coincides with a precautionary approach by lenders in the light of new rules that apply following the financial crisis of a few years ago. Thus, in assessing security on a loan-to-value basis, (1) it is necessary show the highest realistic value of the asset offered as security (as to which, see further below), and (2) in the (almost unthinkable) event of foreclosure, the lender would ordinarily require the ability to be able to sell on the open market, subject to existing tenancies where appropriate (albeit a relatively short "window" – say, two months - to find another Registered Provider would normally be acceptable).

On the question of *loan-to-value*, security covenants by Registered Providers to secured lenders are based on either *Existing Use Value – Social Housing* (EUV–SH) or *Market Value – Subject to Tenancy* (MV–ST); per unit, EUV-SH is generally about £25k less than MV-ST. The ability of CHS to borrow is therefore significantly reduced if EUV-ST is used instead of MV-ST. If South Cambridgeshire DC is unwilling to accept the standard form MIP, the result would be either a reduced number of affordable homes provided in the district or a decision to develop in other areas where a MIP is accepted, making the development more viable.

On the separate but analogous issue of affordable housing provided by way of *shared ownership homes for sale*, these also help subsidise the provision of social rented homes. Mortgage providers to the individual buyers of these homes also require a MIP clause.

In this case, the Council's locum solicitor agreed to the insertion of a MIP clause on 26 August; as indicated above, such clauses remain the norm and are used throughout England, including cases involving Rural Exceptions sites.

For the avoidance of doubt, my instructions are clear; the absence of a MIP clause in the section 106 agreement for Daniels Close, Willingham will render the scheme unviable, and the failure to agree such clauses means that CHS will cease to develop affordable housing in South Cambridgeshire.

Please let me know if anything requires clarification.

Kind regards,

**Philip Kratz | Consultant | Planning and Environmental Team | Birketts LLP | [www.birketts.co.uk](http://www.birketts.co.uk)**

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