

Planning Committee

Item
9

Date 7 January 2015

Report of	Head of Commercial Services	Author	Alistair Day 01206 282479
Title	Mortgagee In Possession Clauses for Affordable Housing Delivery		
Wards affected	All Wards		

This report concerns a request to provide the Head of Commercial Services with delegated powers to enter into Deed of Variation to amend s106 planning agreements in respect of affordable housing mortgagee exclusion covenants.

1.0 Decision Required

- 1.1 The Planning Committee is asked to endorse the recommendation to give the Head of Commercial Services delegated powers to enter into Deed of Variations to amend the affordable housing mortgagee exclusion clause(s) in s106 planning agreements

2.0 Reasons for Decision(s)

- 2.1 The current Scheme of Delegation necessitate that requests for an amendment to the affordable housing mortgagee exclusion clause(s) in existing s106 planning agreements are first approved by the Planning Committee. The Council is receiving number of enquiries from housing associations regarding the possibility of amending mortgagee exclusion covenant(s) to enable them to increase their borrowing potential for the building of new affordable housing. To improve the efficiency of dealing with formal requests, Members are asked to endorse the recommendation that the Head of Commercial Services is given delegated powers to enter into Deed of Variations to amend mortgagee in possession clauses in s106 agreements.

3.0 Alternative Options

- 3.1 Members can decide not to endorse the request to give the Head of Commercial Services delegated powers to enter into Deed of Variations to amend affordable housing mortgagee exclusions clauses. If Members select this option, all future requests for such amendments would need to be brought before the Planning Committee for approval.

4.0 Supporting Information

- 4.1 Under the Town and Country Planning Act 1990 (as amended) any person interested in land 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 subject to the normal public law constraints of it acting reasonably and requirement 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.
- 4.2 Historically, affordable housing covenants in s106 legal have contained clauses that place restrictions on the tenure of affordable housing and generally do not contain a mortgagee in possession clauses which adequately protects a mortgagee (i.e. a clause that enables the lender to recover their costs in the event of default by a housing association). Such clauses (or the absence of such clauses) reflected the housing environment at the time the agreements were signed and the fact that finance for the provision of affordable housing (particularly from public sources) was more freely available.
- 4.3 Following the financial crash in 2007, lenders have become increasingly risk adverse and, when providing funding to housing associations, they 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. The mortgagee exclusion clause(s) contained in many historic legal agreements are now considered defective by lenders to the housing associations.
- 4.4 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 consideration in the lending available and the cost of the borrowing. A property is charged by a housing association to a lender at either market value subject to tenancy (MVST) or existing use value social housing (EUV-SH). If a property is charged at MVST, a lender will usually be willing to offer about 2/3rds of the open market value of the property. Where there is a binding legal document which does not have an effective mortgagee exclusion clause then a lender will only provide finance at EUV-SH level which typically equates to 1/3rd of the open market value of the property. By way of example, assuming a property is worth £200,000, if there is an effective mortgagee exclusion clause, then the property can be charged at £132,000 (2/3rds of the value of the property) but if there is a defective mortgagee exclusion clause then the lender will only loan £66,000 (1/3rd of the value of the property). When this difference is multiplied across the number of affordable of units in a development site the difference becomes considerable.
- 4.5 With almost non-existent public grant levels, the ability of housing associations to maximise borrowing is becoming more critical. The Council has received a number of enquiries regarding the possibility of amending s106 mortgagee exclusion covenants and a formal request from Chelmer Housing Partnership in relation to the Garrison development has recently been considered (and agreed) by the Planning Committee. It is expected that the number of formal requests to amend s106 mortgagee exclusion covenants will increase in the coming months. To ensure that such requests are dealt with as efficiently as possible, Members are asked to extend the Head of Commercial Services delegated powers to the authorisation of Deed of Variation(s) in respect of mortgagee in possession clauses.

- 4.6 If delegated powers are extended to the Head of Commercial Services in respect of mortgagee in possession clauses, Members are advised that the circumstances of each case will be fully considered, in consultation with specialist officers, and that current best practise will be followed (as appropriate). In this sense there will be no difference in terms of the decision making process undertaken by officers in respect of such requests.

5 Strategic Plan References

- 5.1 A key aim of the Strategic Plan (2015-18) is to generate opportunities for growth and infrastructure. The inclusion of an appropriately worded mortgagee in possession clauses in all relevant s106 agreements will help maximise housing association borrowing and thereby support opportunities to increase the number of affordable homes for local people.

6. Consultations

- 6.1 The Council's Housing Development Strategy Team has made the following comments in respect of this proposal:

"We fully support the inclusion of such mortgagee exclusion clauses on homes owned Registered Providers in the Borough as this will enable the Registered Providers to increase their borrowing capacity that could result in additional funding towards more affordable homes being built. There are some risks associated with the inclusion of such clause but with the governance of the Homes & Communities Agency (HCA) ensuring the future of Registered Providers and no previous examples of Registered Providers defaulting on mortgages any instance of the homes being lost as an Affordable product is extremely low as if a Registered Provider was to default the homes would be transferred or merged to another provider".

7. Resource Implications

- 7.1 The extension of delegated powers to Head of Commercial Service to enter into a Deed of Variation to allow the inclusion of appropriately worded mortgagee in possession clauses will save officer and member time in terms preparing and considering committee reports. The Council's direct legal costs for undertaking a Deed of Variation in respect of mortgagee in possession are largely paid for by the developer or the housing association.

8 Risk Management Implications

- 8.1 Members should note that, in terms of the borrowing by a housing association, the mortgagee in possession clauses 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. The possibility of affordable housing being taken out of the sector by a lender is considered to be extremely remote.

9 Publicity Considerations, Equality, Diversity and Human Rights Implications, Community Safety Implications and Health & Safety Implications.

- 9.1 None directly arising from this report.

Background Papers: Strategic Plan