

CYNGOR SIR POWYS COUNTY COUNCIL.

REPORT TO PORTFOLIO HOLDERS

January 2011

REPORT AUTHOR: Terry Flynn, Affordable Housing Officer

SUBJECT: Section 106 Agreement Template Amendments

REPORT FOR: Decision

Background:

1. Legal agreements under Section 106 of the Planning Act are the means used to secure affordability in perpetuity on properties required under planning gain rules.
1. For some time there have been issues of difficulty in securing funding where these agreements are in place. This is primarily due to lenders being unwilling to provide mortgages on what they see as encumbered assets.
2. In recent months this became an issue for Housing Associations as well as private individuals and Powys CC was asked to assist in finding a solution.

Action Undertaken:

2. A meeting of DC, Legal, Planning Policy and Housing representatives, chaired by the Portfolio Holder for Regeneration, was held and agreed that the risk of a mortgagee taking possession of Housing Association properties was so small as to be negligible and therefore should be accepted as a manageable risk.
1. Legal officers were asked to draft and circulate a form of words acceptable to all parties. This was done and a copy of that wording is attached at annexe 1.

Action requested:

3. That the Portfolio Holders for Regeneration and Housing, with the agreement of the Shadow Portfolio Holder for Housing, Approve the use of this form of words in all Section 106 agreements pertaining to Housing Associations.

Summary

The purpose of this report is to seek approval to amend the wording of the Affordable Housing Section 106 Agreement Template to encourage financial lending against property or land subject to an Affordable Housing Section 106 Agreement.

The main proposed amendments are a flexible interpretation of policy only to be applied in repossession circumstances and will only affect a mortgagee in

possession of the affordable property. The proposed amendments do not apply in normal circumstances when an affordable property is marketed for sale by a developer, initial or subsequent occupier. The main proposed amendments include:

National Planning Policy Context

Section 12 of Technical Advice Note (TAN) 2: Planning and Affordable Housing addresses securing affordable housing and advises that; *'both planning conditions and planning obligations may be used'*.

Further key points raised in TAN 2 include:

to ensure that the affordable housing provided is occupied in perpetuity by people falling within particular categories of need.' (Para 12.2)

This paragraph goes on to explain that; *'should lenders seek the inclusion of such clauses in planning obligations relating to the provision of affordable housing, local planning authorities will wish to weigh the balance of interests carefully and make their own judgements before agreeing to such clauses. The Assembly Government would take steps to persuade lenders against open market disposal, but could not prevent lenders from doing so if the terms on which they had lent allowed such disposal.'* (Para 13.3)

It is considered that in current financial climate, it is reasonable to apply the circumstances outlined in Para 13.3 to all affordable housing developers and not just registered social landlords.

The **Housing MIPPS 01/2006** states that Development Plan Policies should: *'also state what the authority would regard as affordable housing and what arrangements it would expect to ensure that such housing remains reserved for those who need it.'*

Relevant Powys Unitary Development Plan Policies

In considering the proposed amendments, it is important to highlight the Powys Unitary Development Policies on Affordable Housing.

Policy HP7 – Affordable Housing within Settlements:

'Unless the affordable housing is to be provided by a Registered Social Landlord, planning permission will only be granted if the developer has first entered into a planning obligation to ensure that the housing remains affordable in perpetuity.

: 'The removal of the requirement that the housing remains affordable in perpetuity will only be considered on the basis of realistic assessments of the continuing need for its retention and where substantial but unsuccessful efforts have been made for at least 12 months to sell or let the property at a price that realistically reflects the existence of the occupancy condition.'

HP10 – Affordability Criteria:

6. : *'Both initial and subsequent occupiers shall not already own a residential property and shall have not recently sold a property unless the Council is satisfied that the occupier has an exceptional need for the affordable home.'*

(The cascade): *'References in this policy to community are defined for initial occupiers as the community council area in which the site lies together with immediately adjoining community of parish council areas. If successive occupiers cannot be found within the community, occupiers' resident at the time in the appropriate shire areas in Powys should be next sought, followed by occupiers*

resident in the rest of Powys and adjoining local authority areas. The Council will require proof that substantial efforts have been made to find a local occupier before the eligible areas is widened to the next level.'

Proposal

An amended Section 106 Template with the changes highlighted in blue is provided in Annex A. The main proposed amendments to the Section 106 Agreement Template are summarised below:

th January 2010. A verbal update will be presented to the Board.

& iv) have been reduced from 6 months to 4 months reduce the period of sale to a total of 12 months in accordance with Policy HP7, criterion D. As before, the property can be offered for sale to a registered social landlord (housing association) in the first instance in accordance with the second schedule, clause 2 i).

Further Justification

The amendments are proposed to allow a lender/mortgagee in possession to sell at the earliest opportunity and to get the best price for the property so that the borrower's debt does not continue to rise.

The Council for Mortgage Lenders (CML) advises that a cascade mechanism should be used to address the perpetuity and occupancy controls on a property. This involves offering a property to a very local market and gradually widening the net until the property can eventually be sold on the open market. The CML also advise that the cascade should take no more that 18 weeks before the property could be offered on the open market. The cascade approach adopted by Powys County Council is explained in Para 3.3. The cascade set out in Policy HP10 is interpreted in the Section 106 Agreement template and is only expanded to allow disposal on the open market as a last resort where a mortgagee is in possession. The CML point out that if there is a strong and continuing market for affordable homes in the area, then there should be no problems selling the property locally.

The cascade set out in the second schedule, para 2. where a mortgagee is in possession is accelerated to a maximum of 20 weeks rather than 12 months & application to remove process. This accelerated process and flexible interpretation of policy only in circumstances of repossession, is considered justified.

The CML advises that the Local Authority or a Housing Association could be given the opportunity to buy the property back. The Section 106 agreement already includes provisions to allow an affordable house to be purchases by a Registered Social Landlord. However, it is proposed that where a mortgagee is in possession, this agreement also includes the provision to offer the property for purchase by Powys County Council once the first three steps of the cascade have been

undertaken. If the Council does not wish to purchase the property, then the property can be sold on the open market.

Corporate Improvement Plan

The Council's CIP identifies the lack of affordable housing as a risk and consequent area for improvement, making the delivery of affordable housing through planning policy a key challenge. This is reflected by the following CIP measure:

Options Considered / Available

To approve the amended Section 106 Agreement Template in part or full.

Preferred Choice and Reasons

Approve the amended Section 106 template in full for the reasons explained in the section 4. & 5.

Sustainability and Environmental Issues / Equalities / Crime and Disorder / Other Policies

.1 The sustainable development scheme 'One Wales: One Planet' sets out the Assembly's aim of making sustainable development the 'central organising principle' for Government and the wider public sector in Wales.

.2 In October 2007, the Council agreed its first Sustainable Development Strategy. The strategy states that, 'the Council will put sustainable thinking at the front of our decision and policy making and at the heart of our service delivery.'

The provision of affordable housing in rural areas supports the development of sustainable rural communities.

The amendments proposed are considered to be a flexible interpretation of policy to encourage lending and subsequent delivery of affordable homes.

Other Consultations Undertaken

Council officers met with Principality Building Society on Friday 4th December 2009. The Principality highlighted their concerns relating to the Section 106 agreement wording and possible amendments were discussed. Following discussion regarding alternative wording, the Principality considered the proposed amendments to be acceptable. A commentary of the old Section 106 Agreement Template by the Principality Building Society is provided in Annex B. Other banks & building societies are being consulted on the proposed amended Section 106 Agreement template wording and letter was sent to the mortgage lenders listed below on 14th December 2009:

& Gloucester
& Leicester

Further consultation with Ceredigion County Council and Jonathan Brown, Land for People was undertaken during the preparation of the amended Section 106 Agreement template.

The AHTG will be asked to consider this report on 8th January 2010. Comments from the AHTG will be reported at the Board meeting. The AHTG includes representation from Housing, Planning, Finance, Estates, Housing Associations, Council Members, Brecon Beacons National Park Authority (BBNPA), BBNPA members and Rural Housing Enabler(s).

The Council's Chief Financial Office, Head of Legal, Scrutiny and Democratic Services, Head of Regeneration & Development and Head of Housing and Public Protection have been consulted.

Recommendation:

Approve the amended Section 106 Agreement clauses for use immediately

Reason for Recommendation:

To reflect the requirements of mortgage and development finance lenders in dealing with Housing Associations. encourage the lending of finance for affordable housing in order to support its delivery.

th January 2010

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NA

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Agreed Wording of the relevant Clauses

“RSL Mortgagee” means a mortgagee of an Affordable Housing Unit where the mortgagor is a Registered Social Landlord (including for the avoidance of doubt the Mortgagee) or any receiver appointed by such mortgagee

PROVIDED ALWAYS that an RSL Mortgagee of an Affordable Housing Unit may dispose of an Affordable Housing Unit on the open market in exercise of its statutory power of sale or otherwise and the obligations contained in this Agreement shall not apply to that disposal and the Affordable Housing Unit subject to that disposal shall thereafter cease to be subject to the obligations under this Agreement