



**Prosperous Communities
Committee**

Tuesday 1 December 2020

Subject: S106 Precedent wording amendment

Report by: Assistant Director of Planning and Regeneration

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Purpose / Summary: West Lindsey have a standard precedent wording for S106 agreements which has been agreed by members. This precedent is increasingly causing delays to the planning process due to the Mortgagee Exemption Clause being unacceptable to Registered Providers (RP.) This report seeks to amend the exemption clause wording currently used, replacing it with the National Housing Federation Mortgagee Exemption Clause wording (as detailed in appendix 2 para. 1).

RECOMMENDATION(S):

That the Committee accepts the National Housing Federation Mortgagee Exemption Clause wording (as detailed in appendix 2 para. 1) as part of the standard S106 precedent wording, and that this wording replace that previously used.

IMPLICATIONS

Legal:

(N.B.) Where there are legal implications the report **MUST** be seen by the MO

Financial : FIN/108/21/TB

(N.B.) All committee reports **MUST** have a Fin Ref

Staffing : None

(N.B.) Where there are staffing implications the report **MUST** have a HR Ref

Equality and Diversity including Human Rights : None

NB: Please explain how you have considered the policy's impact on different groups (for example: young people, elderly, ethnic minorities, LGBT community, rural residents, disabled, others).

Data Protection Implications : None

Climate Related Risks and Opportunities: None

Section 17 Crime and Disorder Considerations: None

Health Implications: None

Title and Location of any Background Papers used in the preparation of this report :

*Wherever possible please provide a hyperlink to the background paper/s
If a document is confidential and not for public viewing it should not be listed.*

Risk Assessment :

Call in and Urgency:

Is the decision one which Rule 14.7 of the Scrutiny Procedure Rules apply?

i.e. is the report exempt from being called in due to urgency (in consultation with C&I chairman)

Yes

No

x

Key Decision:

A matter which affects two or more wards, or has significant financial implications

Yes

No

x

1. Current Approach

- 1.1 West Lindsey have a standard precedent wording for S106 agreements which has been agreed by members. This precedent is increasingly causing delays to the planning process due to the Mortgagee Exemption Clause being unacceptable to Registered Providers (RP.)
- 1.2 The Mortgagee Exemption Clause (MEC) details the process that has to be undertaken should a mortgagee take possession of the properties covered by the S106. The amount lenders are willing to lend against new affordable properties depends on the wording of this clause. All Mortgagee Exemption Clauses ultimately reach the point where the properties can be sold on the open market as that is the purpose of the MEC. The way in which the clause is worded and the steps the lenders must follow to reach this point is the matter for discussion.
- 1.3 Registered Providers are increasingly having to look to the private finance market to borrow funds in order to deliver new affordable homes. In recent years, lenders have become increasingly risk adverse. They require comfort that they will be able to repossess homes built for affordable housing and realise the asset, unfettered by restrictions on valuation and / or occupancy, to ensure unpaid debts could be recouped.
- 1.4 The current MEC clause that is within WLDC S106 precedent reduces the flexibility for Registered Providers to borrow against these units by suppressing the value of each unit due to its categorisation in valuation terms. This can result in lengthy delays to planning applications and protracted requests to amend existing S106 agreements. Accessing further funding to support RP development programmes continues to be a priority in order to meet defined need and support the People and Place objectives within the Corporate Plan. It is therefore important to ensure the approach and process for delivering Affordable Housing in West Lindsey is efficient to ensure continued investment in Affordable Housing across the District.
- 1.5 Registered Providers over the last 12 months or so have advised us they cannot sign up to the current WLDC S106 precedent wording MEC clause as it will stifle their future development and investment programmes.
- 1.6 WLDC's current case by case approach to dealing with this is costly, time consuming and becoming increasingly ineffective.

2. What has changed?

- 2.1 Since the introduction of affordable rent in the Localism Act 2011-, the level of grant funding Registered Providers can access has diminished significantly from what previously was available. The Government's intention for introducing affordable rent was to try and shift more of the

funding requirements for new dwellings onto the sector. This shift has meant that Registered Providers need to borrow more to fill the gap left from the reduced grant funding.

2.2 There has also been a general tightening of lending in the property sector since the credit crunch of 2008. Whilst Registered Providers are generally reliable due to the presence of the Regulator of Social Housing, banks are keen to ensure that the process for taking possession of any properties provides more clarity and works more in-line with existing market requirements. Alongside this, the Registered Provider sector is accessing a far wider range of funding than in the past. For example, a lot of our Registered Providers development finance is through the issue of bonds. As part of establishing these, there is a lot of focus on financial rating and ensuring the strongest asset value can be achieved to mitigate the risks to the investment. The bonds sold directly support Registered Provider's development programmes.

3. What are the risks?

3.1 WLDC have been working with Registered Providers to understand the rationale behind requiring this change to the MEC clause and the checks and balances that are in place which mitigate the risk of the affordable properties defaulting to market properties and ultimately, the tenants having to vacate their homes. A summary of information received from two of our main Registered Providers operating in West Lindsey, in relation to this can be found at appendix 1.

3.2 The application process for becoming an RP is stringent and over 80% of all housing providers who apply are not successful, this offers comfort around financial stability of RP and some of the newer for profit providers that have recently started to appear in the sector. Some of the following are examples of the mitigating factors detailed by RP's:

- In depth reviews and regular monitoring by the Regulator of Social Housing.
- Internal audits of accounts, finance committee and bi-monthly finance monitoring
- Management board with clear finance focus
- Due diligence from funders and robust financial analysis prior to lending.

3.3 The key risk associated with not making a change to the MEC is that Registered Providers would not be able to maintain an adequate build programme and as such develop new affordable housing schemes in the district due to funding difficulties. This in turn causes viability issues for schemes and also makes it difficult for developers to sell Affordable Housing units as part of wider development, as RPs are not able to raise the fund to purchase units delivered through s106 agreements. **Balanced against** - The risk of these new properties being sold on the open market by lenders to Registered Providers as a result of the Registered Provider becoming insolvent. The Regulator of Social

Housing work with Registered Providers who have been identified as financially vulnerable, ultimately seeking a take over from other more solvent Registered Providers should that be required. For context and probably most importantly it should be noted that to date, no MEC clause has been triggered in England and so this clause in any form has never been enacted.

- 3.4 WLDC have an identified need through the Central Lincolnshire Housing Needs Assessment for 592 new affordable homes to be delivered each year. It is acknowledged through the West Lindsey Housing Strategy that this number of affordable units cannot be delivered through the developer contributions sought through the planning obligations alone. This, therefore requires WLDC to work proactively alongside our Registered Provider partners in an enabling and facilitation role to ensure that additional affordable housing can be delivered to meet this identified need.

4. What is the ask?

- 4.1 Lincs Legal have been working with WLDC initially to try and develop a compromise clause which mitigates the risk even further of the properties becoming market units while offering flexibility to Registered Providers and satisfying lenders.
- 4.2 During this work with Lincs Legal and Registered Providers, it has become clear that the only way forward is for WLDC to adopt the NHF wording for the MEC clause. The proposed new MEC wording against the current precedent wording is detailed at appendix 2 paragraph 1.
- 4.3 Given that this clause has been almost universally accepted across the country, Registered Providers lenders are no longer accepting variations.

5. Conclusion

- 5.1 WLDC have been engaged in ongoing discussions with colleagues from Homes England for some time on this matter and have balanced all the risks and opportunities available, including exploring alternative wording. However the alternatives fall short of what is required by lenders to RPs and will not enable to affordable housing the District need.
- 5.2 Equally, whilst it is important for WLDC to consider the evidence and make the right decision for the Local Authority and residents, it is also worth noting the approach other Lincolnshire Authorities have taken. To that end Boston, South Kesteven and East Lindsey have already accepted the NHF wording for the MEC clause.
- 5.3 It is considered that when balancing the risk to future units caused by an RPs insolvency against the risk of substantial under delivery of

affordable housing across the District and Central Lincolnshire that the variation to the MEC clause is an appropriate and managed risk to take.

6. Recommendation

- 6.1 That the Committee accepts the National Housing Federation Mortgagee Exemption Clause wording (as detailed in appendix 2 para. 1) as part of the standard S106 precedent wording, and that this wording replace that previously used.

