

**PLANNING COMMITTEE:** 27<sup>th</sup> October 2020  
**DEPARTMENT:** Planning Service  
**DIRECTOR OF PLANNING:** Peter Baguley

**APPLICATION REF:** N/A

**LOCATION:** Borough Wide

**DESCRIPTION:** Delegated authority for Director of Planning and Sustainability to agree variations to Section 106 Agreements to amend mortgagee exclusion clauses

**WARD:** Borough Wide

**APPLICANT:** N/A  
**AGENT:** N/A

**REFERRED BY:** Director of Planning and Sustainability  
**REASON:** Variation to S106 Agreements

**DEPARTURE:** No

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#### **APPLICATION FOR DETERMINATION:**

##### **1 RECOMMENDATION**

1.1 That the Committee **AGREE** that the Director of Planning and Sustainability be given delegated authority to agree variations of completed Section 106 Agreements in order to amend the wording of the mortgagee exclusion clauses and relevant definitions in completed Section 106 Agreements and any consequential amendments as are considered necessary.

##### **2 THE PROPOSAL**

2.1 Recently several requests have been received from developers seeking to vary Section 106 Agreements in order to amend the mortgagee exclusion clause in completed Section 106 Agreements associated with previously approved planning applications.

2.2 Currently the delegated powers of the Director of Planning and Sustainability, do not allow for variations to Section 106 Agreements and accordingly such requests are considered by Planning Committee.

2.3 Given the number of such requests that are now being received, this report seeks delegated authority to enable the Director of Planning and Sustainability to agree requests for the variation of mortgagee exclusion clauses.

### **3 PLANNING POLICY**

3.1 None.

### **4 CONSULTATIONS/ REPRESENTATIONS**

4.1 None.

### **5 APPRAISAL**

5.1 Mortgagee exclusion clauses (also known as mortgagee in possession clauses or mortgagee protection clauses) are standard in Section 106 Agreements which provide for the provision of affordable housing. These clauses provide for circumstances where a Registered Provider defaults on loan payments and the mortgagee takes control of the Registered Provider's interest in the affordable housing units as assets against which their loan is secured.

5.2 Such clauses allow for another Registered Provider or the Council to purchase the affordable housing units within a specified timeframe under a prescribed procedure. Where the affordable housing units are not purchased within this period, they are released from affordable housing tenure, enabling the mortgagee to dispose of the units to regain some, or all, of the loan that they have provided.

5.3 The wording of a mortgagee exclusion clause affects the level of funding that a Registered Provider is able to secure against the affordable housing units to fund the provision of additional affordable housing as part of their delivery programme.

5.4 Where a mortgagee exclusion clause does not provide sufficient protection for the funder and they would be bound by the affordable housing restrictions in the Section 106 Agreement, the funding value would be limited to Existing Use Value for Social Housing. The best possible funding value is Market Value Subject to Tenancies, where the funder would be able to sell on the open market, to either a Registered Provider or a non-regulated purchaser, and neither the lender nor successors in title would be bound by the affordable housing restrictions in the Section 106 Agreement.

5.5 The wording of the mortgagee exclusion clauses in the Council's Section 106 Agreements are such that the value of the affordable housing units is limited to Existing Use Value – Social Housing. Accordingly, it is proposed that these are amended to enable the affordable housing to be valued at Market Value Subject to Tenancies. This will enable Registered Providers to obtain maximum value and reinvest in further affordable housing schemes. The amendment will not affect the level of provision of the affordable housing required to be provided.

### **6 CONCLUSION**

6.1 The recommended delegation will enable the Director of Planning and Sustainability to respond and deal promptly with requests for variations to mortgagee exclusion clauses in existing Section 106 Agreements.

### **7 BACKGROUND PAPERS**

7.1 No specific reference.

### **8 LEGAL IMPLICATIONS**

8.1 Planning obligations in completed Section 106 Agreements may be varied by agreement at any time and this is reiterated in the Planning Practice Guidance.

8.2 The Social Housing Regulator monitors the financial viability of Registered Providers and can intervene in the management of a Registered Provider in financial difficulty. There are few examples of Registered Providers falling into financial difficulties and where this has been the

case, Registered Providers have to date been taken over by another Registered Provider. There are no known cases of mortgagee exclusion clauses being triggered in relation to assets owned by Registered Providers.

- 8.3 Taking these issues into account, it is considered that any risk associated with a Registered Provider defaulting on a loan and the affordable housing units not being secured by the Council or another Registered Provider is limited and is outweighed by the factors referred to above.

## **9 SUMMARY AND LINKS TO CORPORATE PLAN**

- 9.1 In reaching the attached recommendations regard has been given to securing the objectives, visions and priorities outlined in the Corporate Plan together with those of associated Frameworks and Strategies.