

South Lakeland District Council
Cabinet

5th November 2020

Affordable Housing - Suggested Approach to Mortgagee in Possession Clauses

Portfolio:	Housing and Innovation
Report from:	David Sykes
Report Author:	Dan Hudson - Strategy Lead Specialist and Linda Fisher – Legal, Governance and Democracy Specialist
Wards:	All wards except those wholly within National Parks
Forward Plan:	29/09/2020

1.0 Expected Outcome

- 1.1 Members are advised of a proposed approach to the treatment of requests for Mortgagee in Possession clauses within S106 agreements entered under section 106 of the Town and Country Planning Act “Section 106 Agreements”.

2.0 Recommendation

- 2.1 It is recommended that Cabinet note the report and approve the principles of the approach set out in Paragraph 3.17.

3.0 Background and Proposals

Background

- 3.1 This note refers to development proposals where affordable housing delivery is being secured by Section 106 Agreements in those parts of South Lakeland District Council outside the Lake District and Yorkshire Dales National Parks (i.e. the area for which South Lakeland District Council is the local planning authority. In the National Parks, Section 106 Agreements are negotiated with the relevant national park authority although still advised by South Lakeland District Council as Housing Authority.
- 3.2 At the time of writing, mortgagee in possession clauses were being sought on a number of sites affecting the delivery of affordable homes.
- What is a mortgagee in possession clause?*
- 3.3 A mortgagee in possession is a lender (person or body) which has entered into a mortgage in respect of a dwelling constructed on the proposed development site or part of the proposed development site and has taken action, in the form of taking possession of the said dwelling, following a default by the borrower in respect of the repayment due under that mortgage.
- 3.4 In the context of Affordable Housing, as defined at Annex 2 of the National Planning Policy Framework June 2019, mortgagee in possession clauses are increasingly being sought in Section 106 Agreements by Housing Associations (Registered Providers) – both in new Section 106 Agreements and via modifications to existing Section 106 Agreements. Most Mortgagee in Possession clauses seek to nullify

requirements in Section 106 Agreements related to restrictions on sale price, rental, occupancy, income eligibility and local needs requirements in the event of ownership of the property transferring to a mortgagee from the housing association (Registered Provider, or owner of shared ownership or discounted sale property) through the inclusion of mortgagee in possession clauses.

Why are housing associations seeking mortgagee in possession clauses

- 3.5 The argument put forward by applicants and housing associations (Registered Providers) is that lenders and (in the case of schemes supported by grant aid) Homes England are either making support for schemes conditional on mortgagee in possession clauses or development finance is being made available on less favourable terms. It is therefore argued that the absence of mortgagee in possession clauses is preventing the delivery of affordable housing.

What happens if a housing association fails?

- 3.6 The mortgagee in possession clause issue relates to the (very rare) circumstance in which a Housing Association (Registered Provider) fails and its assets have to be disposed of. Assets might include affordable homes for rent and shares in shared ownership properties. Under Section 96 of the Planning and Housing Act 2015, when a Housing Association goes into administration, in addition to the normal administration objectives, the administrator also has a duty to keep social housing within the regulated sector. Generally when a Housing Association fails, it is taken over by another Housing Association (locally when Impact Housing Association was in difficulties, it was taken over by Riverside). Housing Association failure resulting in the disposal of assets is rare.
- 3.7 The mortgagee in possession issue is not unique to South Lakeland. The Greater London Authority has produced a standard Mortgagee in Possession clause for use by all Greater London Authorities. The issue was considered in the Cumbrian Model Section 106 Agreement produced in 2012 although a cross-Cumbria standard approach was not agreed. The National Housing Federation produced a standard clause that is being used widely.
- 3.8 Standard mortgagee in possession clauses such as the National Housing Federation model and the Greater London model mitigate the risk with the inclusion of a cascading clause to the effect that before a mortgagee in possession clause is triggered, there is a period (normally 3 months) during which the property must be offered for sale to another housing association or a local authority.

What is the Council's policy?

- 3.9 Affordable housing delivery in South Lakeland (outside National Parks) is regulated by Policy 6.3 of the Council's Local Plan - Core Strategy (adopted in 2010). In addition to seeking an on site affordable housing contribution of 35% for sites over a certain size, it requires that affordable housing provided is made available solely to people in housing need at an affordable cost for the life of the property. Policy 6.3 applies predominantly to market housing schemes and these are predominantly on sites allocated in the Local Plan.
- 3.10 A small number of schemes are also delivered as exceptions sites. These are sites which would not normally be granted consent but are approved on an exceptional basis because they are all or predominantly affordable. Policy DM14 of the Local Plan Development Management Policy regulates schemes of this type and requires affordable housing provided in this way be affordable in perpetuity.

What is the issue?

- 3.11 However small the risk of affordable properties being lost in this way, mortgagee in possession clauses are contrary to the letter of both policies in that, in the event of the mortgagee in possession clause being triggered, the properties would cease to be available to people in need at an affordable cost and would not be affordable in perpetuity.

How a flexible approach might be applied?

- 3.12. Planning policy can only be changed through the preparation of a new Development Plan Document. This is a long process requiring informal and formal consultation and independent examination by a planning inspector. All planning policies are currently being examined through the Local Plan review. If the proposals proposed in the Government's Planning White Paper are implemented on the timescale envisaged, the whole planning landscape including matters currently dealt with through Section 106 Agreements, matters dealt with through local plan policy and matters dealt with in national policy and mechanisms for delivering affordable housing may look very different.
- 3.13 Councils can produce supplementary planning documents which provide guidance on the interpretation and implementation of policy. However these cannot change policy.

Development Management and planning decisions

- 3.14 Under Section 38 of the Planning and Compulsory Purchase Act 2004 planning applications are considered against the Council's Development Plan and other material considerations of each individual planning application on a case by case basis. Each application must be determined on its own merits. The inclusion of a mortgagee in possession clause in a Section 106 Agreement means that affordable housing affected by it is contrary to the letter of Policy 6.3. Therefore, upon a strict reading of the policy it would indicate that the proposal to include mortgagee in possession clauses should be refused unless other material considerations justified an exceptional approach.
- 3.15 However in many cases the policy requirement for affordable housing for the lifetime of the property needs to be balanced against impacts on the wider policy objective of affordable housing delivery, the very low risk of the clause being triggered and the mitigating measures in place to ensure that other solutions are explored before it happens.
- 3.16 Cases for exceptional approvals need to be supported by evidence and are likely to have greater weight if the risk of harm (the loss of affordable housing) is mitigated by the inclusion of cascading or other appropriate risk mitigation.
- 3.17 Whilst judgments on individual planning applications cannot be fettered, the following may be relevant in considering planning applications seeking mortgagee in possession clauses,

Policy

- The clear policy requirement that new dwellings should be made available in perpetuity.

The scale and quality of the affordable housing offer

- Issues might include the scale of any non-delivery including how many affordable homes would be delivered with or without the mortgagee in possession clause. Also of relevance would be how such provision relates to evidenced local housing needs identified in the Strategic Housing Market Assessment and other reputable

evidence sources. Consideration may need to be given to the proportion of affordable housing for rent, whether provision is optimal in terms of size and design and whether any would be fully disabled accessible.

The degree to which the proposal is supported by evidence

- Another issue may be the potential threat to the wider objective of affordable housing delivery and the degree to which this is supported with evidence. Direct evidence in the form of a letter from the lender or from Homes England carries the greatest weight. It needs to be shown that the clause will prejudice the delivery of affordable housing on the scheme in question. Wider impacts on the finances of the Housing Association asset base and the capacity to deliver elsewhere are not relevant.

The extent to which the risk of the clause being triggered can be mitigated

- Consideration will also be needed of the degree to which the risk of loss of affordable units can be mitigated. Strong means of achieving this include:
 - By the inclusion of a cascading clause requiring that the mortgagee in possession clause be triggered only after a period during which the property must be offered for sale to a Housing Association or South Lakeland District Council (and any successor authority). The longer such a period is, the greater effect it will have in mitigating the risk and minimising policy conflict. ;
or
 - By the limitation of mortgagee in possession clauses to mortgagees of housing associations. This would obviate the greater risk to the affordable housing stock of defaults on mortgages by purchasers of shared ownership or discounted sale.

4.0 Consultation

- 4.1 None on this report although the issues surrounding mortgagee in possession clauses have been the subject of extensive discussions internally and through the various negotiation processes, particularly with South Lakes Housing who favour the standard mortgagee in possession clause set out in Para 3.8 above. The Council has received feedback from solicitors dealing with applications for developers who are seeking to introduce these clauses. In summary they have said that a consistent approach is required.

5.0 Alternative Options

- 5.1 Planning Policy can only be changed through the preparation of a new Development Plan Document. This is a long process requiring informal and formal consultation and independent examination by a planning inspector. All planning policies are being examined through the current Local Plan review. If the proposals proposed in the Government's Planning White Paper are implemented on the timescale envisaged, the whole planning landscape including matters currently dealt with through Section 106 agreements, matters dealt with through local plan policy and matters dealt with in national policy and mechanisms for delivering affordable housing may look very different. Whilst planning policy can be changed in the longer term, this is of no assistance with current proposals
- 5.2 Councils can produce Supplementary Planning Documents which provide guidance on the interpretation and implementation of policy. However these cannot change the substance of local plan policy.

6.0 Links to Council Priorities

- 6.1 The mortgagee in possession issue relates directly to the delivery of affordable homes to rent and the Council's target of 1000 new homes to rent between 2014 and 2025.

7.0 Implications

Financial, Resources and Procurement

- 7.1 None

Human Resources

- 7.2 None

Legal

- 7.3 The Council is currently dealing with a number of planning applications which following the approval by the Planning Committee of the site for development, solicitors have requested the inclusion of a mortgagee in possession clause. These requests have ranged from clauses seeking to allow the mortgagee in possession to sell free of the affordable housing obligations to solicitors offering a cascade clause including provision for the properties to be offered back to another Housing Association in the first instance or back to the Council.
- 7.4 These negotiations have become quite protracted and the Council's current scheme of delegation to enter into section 106 Agreements provides the following:

"1. To the Director of Customer and Commercial Services

- 1.1 *To exercise all powers or duties conferred or imposed upon the Council, under or by virtue of any enactment, as Local Planning Authority for the District except those delegated to the Legal, Governance and Democracy Lead Specialist (Monitoring Officer) in 2 below. This includes those functions relating to town and country planning and development control as set out in Schedule 1 of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000, with the following specific exceptions, which will remain with the Planning Committee:*
- a) *Any specific application requested in writing by a Member to be determined by the Committee. Such request should be made within 21 days of the publication of the application on the weekly list. Any such written request must include the reason(s), based on material planning considerations for that request. Any such request will be considered by the Chairman (or Vice Chairman in his/her absence) of the Planning Committee in conjunction with the Operational Lead Specialist Services.*
 - b) *Any application contrary to the Development Plan, or other planning policies or guidance of the Council if the recommendation would be to approve the application, save in the circumstances set out in paragraph 1.8 below.*
 - c) *Any application at the discretion of the Director where the views of Members are considered to be desirable or essential.*
 - d) *Any specific action to be taken at the discretion of the Director where the views of Members are considered to be desirable or essential.*
 - e) *Any specific items requested by a Member where consideration of enforcement action is involved.*
 - f) *Applications by Members of the Council, Officers, and other parties for which probity rules indicate that a Committee decision is required.*

- 1.2 *To exercise the powers of entry set out in Sections 196A, 196B, 196C, 214B, 214C, 214D, 324 and 325 of the Town and Country Planning Act 1990 (as amended) and Sections 88, 88A and 88B of the Planning (Listed Building and Conservation Areas) Act 1990 (as amended) and section 74 of the Anti-Social Behaviour Act 2003 and Regulation 12 of the Hedgerow Regulations 1997 and to authorise all other planning officers whose duties require such powers.*
 - 1.3 *To exercise all powers and duties conferred upon the Council relating to complaints about High Hedges (Part 8 of the Anti-Social Behaviour Act 2003).*
 - 1.4 *Following consultation with the appropriate Ward Member(s), to make observations on behalf of the District Council to the Lake District National Park Authority, the Yorkshire Dales National Park Authority and Cumbria County Council in respect of footpath and bridleway proposals under the Highways Acts.*
 - 1.5 *Following consultation with the appropriate Ward Member(s), to make observations on behalf of the District Council to the Lake District National Park Authority and the Yorkshire Dales National Park Authority in respect of footpath and bridleway proposals under the Town and Country Planning Acts.*
 - 1.6 *To make representations to the Secretary of State on draft Orders for the stopping-up or diversion of highways to enable development to be carried out in accordance with planning permission.*
 - 1.7 *To respond to consultations on proposed Modification Orders to the Definitive Footpath Map, providing no objections are raised to such proposals by the Ward Member(s).*
 - 1.8 *The Director of Customer and Commercial Services may determine applications to vary planning conditions made under Section 73 of the Town and Country Planning Act 1990 relating to caravan sites seeking not to comply with a condition requiring them to close for 6 weeks when the Council's standard holiday conditions can be substituted."*
- 7.5 The Director of Customer and Commercial Services' power to exercise planning functions is constrained by 1.1 (a) – (f), where powers remain with the committee. At 1.1 (b) applications (and therefore variations) that are "*contrary to the Development Plan, or other planning policies or guidance of the Council*" are excluded from the delegation.
- 7.6 There is no specific delegated power to vary S106 Agreements which are contrary to policy, the only express variation power relates to conditions regarding caravan sites at paragraph 1.8. As the Council's published policy is that affordable housing should remain as such in perpetuity the inclusion of mortgagee in possession clauses would be contrary to this policy. The delegated authority that we have to enter into S106 agreements is limited to being within the policy framework that the Council operates. It is also within the remit of the decision taken by the committee (if the matter proceeded to committee).
- 7.7 Following agreement by the Cabinet of the principles in this report, all planning applications which obtained approval via Planning Committee and which have subsequently requested the inclusion of a mortgagee in possession clause will need to be reported back to the Planning Committee on the 26th November 2020. Other applications including future applications dealt with under the Scheme of Delegation will following Cabinet approval seeking the inclusion of a mortgagee in possession

clause to be considered and determined by the Director of Customer and Commercial Services.

Health, Social, Economic and Environmental

7.5 This report does not result in any substantive change.

Equality and Diversity

7.7 This report does not result in any substantive change

Risk

Risk	Consequence	Controls required
Affordable Housing is lost because mortgagee in possession clauses are triggered.	In the event of a housing association getting into difficulties, its assets could pass to a lender who would be able to dispose such assets on the open market.	In perpetuity policy presumption against mortgagee in possession clauses. Where mortgagee in possession clauses are justified, a cascading approach should be applied before a mortgagee in possession clause is triggered
Affordable Housing is not delivered because housing associations and developers are not able to secure finance for delivery.	Housing associations choose not to develop in South Lakeland. The affordable housing offer from market schemes is reduced in quantity or in quality.	Allowance is made through the development management process.

Contact Officers

Daniel Hudson, Strategy Lead Specialist, 01539 793378 d.hudson@southlakeland.gov.uk

Linda Fisher Legal, Governance and Democracy Specialist (Monitoring Officer) Direct Tel: 01539 793370 Email: linda.fisher@southlakeland.gov.uk

Appendices Attached to this Report

None

Background Documents Available

None

Tracking Information

Signed off by	Date sent	Date Signed off
Legal Services	13/10/2020	18/10/20
Section 151 Officer	13/10/2020	26/10/20
Monitoring Officer	13/10/2020	18/10/20
CMT	22/10/2020	26/10/20

Circulated to	Date sent
Lead Specialist	NA
Human Resources Lead Specialist	13/10/2020
Communications Team	NA

Circulated to	Date sent
Leader	19/10/2020
Committee Chairman	NA
Portfolio Holder	13/10/2020
Ward Councillor(s)	NA
Committee	NA
Executive (Cabinet)	05/11/2020
Council	NA