

Item No.	Classification: Open	Date: 17 January 2023	Decision Taker: Cabinet Member for the Climate Emergency and Sustainable Development
Report title:		Mortgagee in Possession Clause in Section 106 Legal Agreements for Planning Applications	
Ward(s) or groups affected:		All	
From:		Planning and Growth	

RECOMMENDATIONS

1. That the Cabinet Member for the Climate Emergency and Sustainable Development:
 - i) Agrees the Director of Planning and Growth has delegated authority to make decisions on deeds of variation to Section 106 planning legal agreements to vary the Mortgagee in Possession (MIP) clause where appropriate; and
 - ii) Agrees the Director of Planning and Growth has delegated authority to require the inclusion of the GLA Mortgagee in Possession (MIP) clause in Section 106 planning legal agreements where appropriate and on consideration of a the financial strength of the Registered Provider,

until 31 December 2024 or the adoption of an Affordable Housing and Viability SPD, whichever is the earlier.

BACKGROUND INFORMATION

2. This report seeks delegated authority to the Director of Planning and Growth to approve the variation of S106 agreements on planning applications to vary the Mortgagee in Possession (MIP) clause. The report also seeks delegated authority to the Director of Planning and Growth to include the GLA Mortgagee in Possession (MIP) clause in Section 106 planning legal agreements on consideration of the financial strength of the Registered Provider. This intervention is a targeted approach to apply the Greater London Authority (GLA) MIP clause prior to the Council's new Affordable Housing and Viability SPD being updated and consulted on next year.
3. The Greater London Authority (GLA) has produced a standard MIP clause in order to promote a consistent approach across London and facilitate

Registered Housing Providers to leverage sufficient levels of finance to increase the delivery of affordable homes.

4. This was informed by convening London Borough Councils and registered providers to consider potential alternative approaches and risks to this approach. The GLA produced a note (**Appendix 1**) in 2019 which has become widely used by London Borough Councils to ensure funding for affordable housing delivery, whilst ensuring the role of the local authority in enabling the affordable units to be acquired, in the event of a default by the original Registered Provider.
5. The Council's standard MIP clauses within its Section 106 agreement typically provide for a 6 month or on occasion a 4 month timeframe known as the 'moratorium period' under a prescribed procedure. They enable Registered Providers (RPs) (which include Housing Associations) to provide for circumstances of defaults on loan payments or other loan/mortgage terms. A mortgagee (or other relevant funding party) takes control of the RP's interest in affordable housing units as assets against which their loan is secured. A robust financial case will need to be set out by a Registered Provider (RP) in order for the Council to accept the GLA MIP clauses.
6. The GLA MIP clause allows for another RP to purchase the affordable housing units within a specified 3 month 'moratorium period' that is satisfactory to major bank lenders. This is set out in the S106 agreement and is a contractual arrangement. Where the units are not purchased within this period, they are released from affordable tenure, enabling the mortgagee to dispose of the units in order to regain some or all of the loan that they have provided.
7. Registered Providers would like to borrow money against their capital assets. It is difficult to access capital from banks with the Council's standard MIP clause in place. With a 4/6 month moratorium period in place, banks consider the asset is not sufficiently "liquid" and that limits the extent to which they are willing to provide finance to the RP. This in turn limits the ability of RPs to invest in affordable housing delivery. This reticence from banks is in part a consequence of a more cautious attitude to bank lending following the crash of 2008–9. The difficulty in businesses securing bank finance more generally has been a feature of the recent Covid-19 crisis, and "mini budget". From the Registered Providers point of view, this severely constrains their ability to increase delivery of affordable housing, despite the considerable capital assets they possess. Given the very large scale of investment over their entire portfolios, it is clearly beneficial to RPs if they are able to secure additional financing in the future for new builds against the asset of their completed scheme.
8. The GLA advice note states that should a Registered Provider go into administration then another RP or the local authority have three months, the moratorium period, to buy up the S106 affordable housing. If after three months the homes remain unsold then the mortgagee (usually a

bank that has financed the Registered Provider) can sell the S106 housing and the requirements for it to be affordable contained in the S106 will no longer apply.

9. A Registered Provider going into administration is a very unlikely set of circumstances. No major Registered Provider has ever done so. As stated in paragraph 5 of the GLA note, *“there are few examples of RPs falling into financial difficulties and where this has been the case such RPs have been taken over by another RP”* and *“there are no known cases of a MIP clause being triggered in relation to assets owned by RPs.”*
10. The GLA MIP Clause states the following:
11. *“Prior to seeking to dispose of the Affordable Housing Units and any Additional Affordable Housing Units pursuant to any default under the terms of its mortgage or charge or any security documentation, the Registered Provider’s Mortgagee or the Receiver shall give not less than three months written notice to the Council of its intention to complete the transfer of the Affordable Housing Units and any Additional Affordable Housing to the Council at the market rate for Affordable Housing PROVIDED THAT the consideration will not be less than the amount due and outstanding under the terms of the relevant security documentation including all accrued principal monies, interest and costs and expenses;*
12. *If the Council cannot, within three months of the date of the Registered Provider’s Mortgagee or Receiver’s notice, complete the transfer of the Affordable Housing Units and any Additional Affordable Housing, only then will other Registered Providers be entitled to complete the transfer. If the Council, the Registered Provider’s Mortgagee, Receiver or any other person cannot, within three months of the date of the Registered Provider’s Mortgagee or Receiver’s notice, complete a transfer of the Affordable Housing Units and any Additional Affordable Housing then provided that the Registered Provider’s Mortgagee/ or Receiver shall have fully complied with its obligations above (in clause X), the Registered Provider’s Mortgagee or Receiver shall be entitled to dispose free of the restrictions set out in paragraph 1 of Schedule 3 (Affordable Housing) and set out in the Nominations Agreement which provisions in respect of the relevant Affordable Housing Units and any Additional Affordable Housing shall determine absolutely.”*

KEY ISSUES FOR CONSIDERATION

13. On 4 May 2020, the Council’s Planning Committee agreed to vary the Section 106 agreement for the Malt Street (17/AP/2773) and Nyes Wharf (17/AP/459) developments in the Old Kent Road Opportunity area to include the MIP Clause.
14. The report noted that the Council would update its Affordable Housing and Viability SPDs to set out that a robust financial case must be set out by a Registered Provider in order for the Council to accept the GLA MIP

clause.

15. The Council's Cabinet have recently adopted the new Local Development Scheme which sets out the timetable for preparing new policy documents and guidance. The updated Affordable Housing and Viability SPD is planned for consultation in October-December 2023.
16. In the meantime, there have been a number of key strategic development schemes which have been approved with a S106 agreement in place without the GLA MIP clause, and others where the s106 has yet to be concluded.
17. There is a risk that these schemes will stall if the S106 agreement cannot be amended to include the GLA MIP clause, as a consequence of the limits it would place on Registered Providers accessing sufficient finance to purchase the s106 affordable housing elements of these schemes.
18. As part of the decision making process, the individual Registered Provider would need to convince the Council of a secure financial position in order to benefit from a deed of variation or agreement to use the GLA MIP clause in a s106 agreement.

Policy framework implications

19. The Southwark Plan 2022 is the Local Plan for the borough which includes a housing trajectory including social rented and intermediate homes policies and site allocations for key development sites. It contains targets for growth including an annual housing target as set by the London Plan 2021.

Community, equalities (including socio-economic) and health impacts

Community impact statement

20. If the MIP clause was to be triggered after the moratorium period then it could affect the delivery of affordable housing for Southwark residents as it may result in an eventual loss of affordable housing, but for the reasons outlined in the main report, this would be an unlikely outcome. The main purpose of this report is to ensure that the affordable homes secured through planning permissions are built. The provision of these new affordable homes would have a positive effect on the community as it would ensure the delivery of new affordable homes which may otherwise not be delivered or could be delayed.

Equalities (including socio-economic) impact statement

21. The public Sector Equality Duty (PSED) contained in Section 149 (1) of the Equality Act 2010 imposes a duty on public authorities to have, in the exercise of their functions, due regard to three "needs" which are central to the aims of the Act:

- a) The need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act
 - b) The need to advance equality of opportunity between persons sharing a relevant protected characteristic and persons who do not share it. This involves having due regard to the need to:
 - Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
 - Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
 - Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
 - c) The need to foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to tackle prejudice and promote understanding.
22. The protected characteristics are: race, age, gender reassignment, pregnancy and maternity, disability, sexual orientation, religion or belief, sex, marriage and civil partnership.
23. The council must not act in a way which is incompatible with rights contained within the European Convention of Human Rights.
24. The council has given due regard to the above needs and rights where relevant. If the MIP clause was to be triggered after the moratorium period then it could affect groups with protected characteristics as it may result in an eventual loss of affordable housing, but for the reasons outlined in the main report, this would be an unlikely outcome. The main purpose of this report is to ensure that the affordable homes secured through planning permissions are built. The provision of these new affordable homes could have a positive effect on groups with protected characteristics as they could potentially be occupants of the new affordable homes which may otherwise not be delivered or could be delayed.

Health impact statement

25. N/A

Climate change implications

26. N/A

Resource implications

27. There will be resource required to validate, assess and amend S106 legal agreements when applications are submitted. This will be carried out using existing resources in the Planning and Growth division and the Planning Legal team. Reports will be published on the Planning Register in the normal way.

Legal implications

28. Please refer to the comments from the Director of Law and Governance.

Financial implications

29. There will be no resource implications on the council in terms of s106 work as this will be covered as part of the planning service.

Consultation

30. N/A

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Governance

31. Under paragraph 12 of Part 3D of the Constitution the Cabinet Member has authority to agree reports where there are any significant changes associated with the delivery of an agreed plan – in this case prior to the Council's new Affordable Housing and Viability SPD being updated and consulted on next year.
32. The Cabinet Member is being asked to agree that the Director of Planning and Growth has the authority to take decisions in respect of applications to vary a s.106 planning agreement Mortgagee in Possession clause and further to agree the inclusion of the GLA Mortgagee in Possession clause if considered appropriate on the financial strength of the Registered Provider.
33. The Director of Planning already has delegated authority to enter into an appropriate s.106 planning agreement in line with the resolution to grant planning permission. The power to vary the s.106 agreement in this way would therefore fall within the remit of that existing power.
34. This is a time limited authority which will expire on the earlier of 31 December 2024 or the updated Affordable Housing and Viability SPD being adopted. In the event that the SPD has not been adopted by that time the authority to vary the s.106 Agreements will lapse and the Cabinet Member would need to refresh the authority for the Director of Planning and Growth. It would be prudent at that time to update members of Planning Committee on the outcome of adopting the GLA Mortgagee in Possession clause thus far.

Strategic Director of Finance and Governance (CE22/055)

35. This report is requesting the Cabinet Member for the Climate Emergency and Sustainable Development to agree recommendations of this report.
36. The strategic director of finance and governance notes that there are no new immediate financial implications arising from this report.
37. Staffing and any other costs connected with this report to be contained within existing departmental revenue budgets.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Mortgagee in possession S106 clause - Malt Street redevelopment See hyperlink below -	Online	Planning and Growth 020 7525 5403
https://moderngov.southwark.gov.uk/documents/s88488/Report%20Mortgagee%20in%20possession%20S106%20clause-%20Malt%20Street%20redevelopment.pdf		

APPENDICES

No.	Title
Appendix 1	GLA Mortgagee in Possession Practice Note – January 2019

AUDIT TRAIL

Lead Officer	Stephen Platts, Director of Planning and Growth	
Report Author	Colin Wilson, Head of Old Kent Road and Strategic Applications	
Version	Final	
Dated	15/12/2022	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments Included
Director of Law and Governance	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	No
Date Final Report sent to Constitutional Team	15 December 2022	