

Item No. 6.	Classification: Open	Date: 4 May 2020	Meeting Name: Planning Committee
Report title:	Mortgagee in Possession S106 Briefing - Malt Street and Nyes Wharf redevelopment		
Ward(s) or groups affected:	Old Kent Road		
From:	Director of Planning		

RECOMMENDATION

1. That committee authorise the director of planning to agree to the following Mortgagee in Possession (MIP) clause within the joint S106 agreement for the Malt Street redevelopment, that was considered by committee on 3 June 2019 (planning ref 17/AP/2773) and for the Nyes Wharf redevelopment the was considered by committee on 3 September 2018 (planning ref 17/AP/4596) and that committee were minded to approve subject to referral to the Mayor of London, the Secretary of State and completion of the S106 agreement.

“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;

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.”

BACKGROUND INFORMATION

2. In June 2019 planning committee resolved to grant planning permission for the Malt Street redevelopment (ref 17/AP/2773).The hybrid scheme was part in outline and part in detail, to be delivered over three phases and comprising up to 1,300 homes of

which 25% would be for social rent and 15% for intermediate discount market rent (40% affordable housing in all). In addition the scheme would deliver 5,000sqm of commercial uses and a key section of the Old Kent Road linear park (1.5ha in total). A copy of the report is contained in Appendix 1 and the site plan at Appendix 2.

3. Since committee, officers have continued to negotiate the details of the Section 106 agreement (S106). Agreement has been reached on all but one issue, the Mortgagee in Possession clause (MIP). Within the agreed elements of the S106, the developer has committed to funding all the heads of terms contained in the June 2019 committee report including the delivery of 40% affordable housing, the council's revised employment and apprenticeship scheme, contributions to the maintenance of the LBS portion of the linear park and funding a share of its fit out, and contributions to public transport.
4. The Malt Street scheme was subsequently referred to the Mayor of London and signed off at stage 2 by the Mayor in December 2019. A copy of the Mayor's report is attached in Appendix 3.
5. On 3 September 2018 committee were minded to grant planning permission for the immediately neighbouring site at Nyes Wharf which was owned by Peabody. This scheme comprised 153 homes with 37% affordable housing and 1,193sqm of B1 floor space. A copy of the report is contained in Appendix 4 and the site plan at Appendix 5. The scheme was referred to the Mayor of London and signed off at stage 2 in March 2019. A copy of the Mayor's Report is attached in Appendix 6. Since the applications were considered by committee, Peabody has sold its interest to Berkley Homes. Peabody will then acquire all the affordable housing units on the Malt Street and Nyes Wharf sites as the Registered Provider. The total affordable housing over both schemes will be secured in a joint S106 at 40% comprising circa 581 affordable homes, 359 at social rent and 222 shared ownership.
6. In total 269 homes would be built in phase 1 of which 142 would be affordable homes, comprising 48 social rented homes and 94 shared ownership homes. This comprises 24% of the total affordable housing in the scheme. In addition 4,135 sqm of B1c commercial space would also be built in the first phase, including affordable workspace.
7. In resolving to grant planning permission committee authorised the director of planning to negotiate the details of the s106 agreement, within the terms of the committee report. The latter references the council's 2008 Affordable Housing SPD (paragraph 76) as a material consideration (although it should be noted it is supplementary guidance rather than planning policy) and this requires the affordable housing to be provided "in perpetuity".
8. In January 2019 the Mayor of London produced a note on Mortgagee in Possession clauses within s106 agreements (Appendix 7). As set out in the note, the motivation for this was to have a consistent approach to MIP clauses across the London boroughs and to secure greater access to funding for RPs to increase the delivery of affordable housing. This is particularly important given the absolute reduction in grant funding to RPs over the last ten years (which has halved during that period). In order to achieve this, the GLA MIP clause would allow, in certain limited and unlikely circumstances, affordable housing to no longer be "in perpetuity".
9. Peabody agreed to purchase the affordable housing scheme from Berkley on the basis the GLA MIP clause would form part of the S106 agreement. Peabody have

confirmed that they cannot proceed as the RP partner in this scheme without this clause – it was part of their assumptions in their negotiations with Berkeley from the start .Berkeley are not in a position to find a new RP partner able to deliver the affordable housing on the terms of the resolution to grant planning permission.

10. The purpose of this report to the planning committee is to clarify the committee's views on this in the particular circumstances of this scheme so that the permission can be issued and work started on delivering the new homes.
11. This would be in anticipation of a revision to the guidance contained in the Affordable Housing SPD and the Viability SPD which would set out Southwark's approach to this question.
12. If this is not agreed, the permission cannot be issued and work cannot start. Berkeley Homes have confirmed that they will be submitting an appeal against non determination and this would, at the least, lead to major delays in the delivery of any development on this site. If the appeal were to succeed, it would also risk the new scheme delivering considerably less than 40% affordable housing, as Berkeley have indicated that they would reopen the viability issue as part of their appeal case.

KEY ISSUES FOR CONSIDERATION

13. In late 2018 London Boroughs and the G15 group of Housing Associations were invited to a series of meetings with the GLA, the purpose of which was to help secure additional bank financing to RPs to help meet London's affordable housing targets. The aims of the GLA was to establish a consistent approach to MIP clauses across London providing greater certainty to RPs and LPAs about their obligations, speeding up the s106 process and enabling access to additional sources of capital funding that could help accelerate affordable housing delivery. London Councils' representatives also took part and the guidance note was subsequently endorsed by London Councils.
14. The GLA advice note states that should a Housing Association go into administration then another RP or 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 Housing Association) can sell the S106 housing and the requirements for it to be affordable contained in the S106 will no longer apply (paragraph 1.6 of the note). The requirement for the property to be offered for sale at the "market" rate for affordable housing would also fall away. Whoever purchases the property would inherit all outstanding tenancy and lease arrangements. However the requirement for these to remain affordable in perpetuity would no longer apply. This is where the GLA MIP clause differs from Southwark's.
15. It is not necessarily the case that the construction of a S106 development will be debt financed. The Malt Street scheme is entirely financed by Peabody from its own reserves, comprising a total eventual investment of £150m. Peabody, in common with other housing associations, are looking to increase the delivery of affordable housing in an environment of constrained government finance and in particular reduced grant funding. This is approximately half what it was in 2010. This means they need to look increasingly to private bank finance.
16. In order to access this, housing associations would like to borrow money against their capital assets. It is difficult to access capital from banks with the standard MIP clause in place. Banks consider the asset is not sufficiently "liquid" and are not willing

to lend against it. This reticence 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. From the Housing Associations point of view, this severely constrains their ability to increase delivery of affordable housing, despite the considerable capital assets they possess. In this instance, Peabody have funds to deliver this scheme, but given the very large scale of their investment, they are only willing to make such a commitment on the basis that they are able to secure additional financing in the future against the asset of the completed scheme. This can only be achieved with the GLA MIP clause in place.

17. A housing association going into administration is a very unlikely set of circumstances, no major Housing Association 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.”
18. It is not the GLA’s intention that their MIP clause would apply in all cases. Paragraph 7 of the note states that “there may be cases where it may not be appropriate to apply the revised clauses such as where the GLA and a LPA have legitimate concerns regarding the financial position of the RP.” Our revised guidance in our Affordable Housing and Viability SPDs will reflect this approach. We will only agree to this clause if we are convinced of the secure financial position of the individual RP.
19. In the case of Malt Street and Peabody, they are one of the largest RPs in the UK with a considerable asset base with 65,255 homes under management, an annual turnover of £630m, an annual profit of £160m and assets of £7.6bn. Officers consider that in this particular case, given the secure financial and asset base that Peabody possess, there would be very little risk associated with the revised MIP clause, whilst there would be a very considerable benefit comprising the early delivery of 480 affordable homes. This would make a significant contribution to addressing Southwark’s housing need and would represent 25% of the borough’s annual housing target. The housing contribution of both schemes provide circa 60% of our annual target.
20. Paragraph 8 of the report notes that the “GLA will promote (the use of this clause) for schemes that are referable to the Mayor of London.” As noted in the introduction the Mayor of London has considered this scheme, including its draft S106 at Stage 2 and is content for Southwark to issue the planning approval. GLA officers have confirmed that they consider the use of their MIP clause to be appropriate for use in this scheme, for the reasons set out in the above paragraph.
21. Officers consider that in this instance the revised MIP is acceptable and will help secure one of the largest affordable housing schemes in the borough at a difficult time economically as we emerge from the Covid-19 crisis. This will help secure the Council’s 5 year housing target, which is likely to be under pressure in the near and medium term.
22. This does not mean that the GLA MIP would be applicable in all circumstances. Our revised Affordable Housing and Viability SPDs will set out that a robust financial case must be set out by an RP in order for the council to accept the GLA MIP clause. This guidance should be produced for consultation within the next 2 months. Given that S106 agreements take on average at least 6 months to complete, this guidance

should be in place before any of the current schemes coming before committee have had their S106 agreements finalised.

23. This would not therefore set a precedent for other schemes.
24. Since the GLA note was produced, other councils have adopted its recommendations including LB Islington, LB Tower Hamlets and LB Lambeth. Most recently the GLA MIP clause has been included in the Kennington Oval gas works scheme approved by LB Lambeth in 2019.

Equalities assessment

25. 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.
26. The protected characteristics are: race, age, gender reassignment, pregnancy and maternity, disability, sexual orientation, religion or belief, sex, marriage and civil partnership.
27. The council must not act in a way which is incompatible with rights contained within the European Convention of Human Rights.
28. 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 we think this would be an unlikely outcome. The main purpose of this report is so S106 agreement can be agreed and the schemes, and importantly the affordable homes secured, can be built out. 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 provided by Peabody which may otherwise not be delivered or could be delayed.

Human rights implications

29. This report engages certain human rights under the Human Rights Act 2008 (the HRA). The HRA prohibits unlawful interference by public bodies with conventions rights. The term 'engage' simply means that human rights may be affected or relevant.
30. It has the legitimate aim of providing a redevelopment of the sites to provide new homes with retail and commercial floorspace. The rights potentially engaged by this, including the right to a fair trial and the right to respect for private and family life are not considered to be unlawfully interfered with by this proposal.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

31. None.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Site history file: TP/2327-79 Application file: 17/AP/2773 & 17/AP/4596 Southwark Local Development Framework and Development Plan Documents	Chief Executive's Department 160 Tooley Street London SE1 2QH	Planning enquiries telephone: 020 7525 5403 Planning enquiries email: planning.enquiries@southwark.gov.uk Case officer telephone: 020 7525 5604 Council website: www.southwark.gov.uk

APPENDICES

No.	Title
Appendix 1	<p>Malt Street Committee Report</p> <p>Link (please copy and paste into your browser): http://modern.gov.southwark.gov.uk/documents/s82712/Report%20and%20Appendix%201%20and%202%20Malt%20Street%20Regeneration%20site%20Land%20bounded%20by%20Bianca%20Road%20Latona%20Road.pdf</p>
Appendix 2	<p>Malt Street Site Plan</p> <p>Link (please copy and paste into your browser): http://modern.gov.southwark.gov.uk/documents/s82721/Site%20Plan%20Malt%20Street%20Regeneration%20site%20Land%20bounded%20by%20Bianca%20Road%20Latona%20Road%20Haymerle%20Road%20F.pdf</p>
Appendix 3	<p>Malt Street GLA Stage 2 Report</p> <p>Link (please copy and paste into your browser): http://planbuild.southwark.gov.uk/documents/?GetDocument=%7b%7b%7b!PM%2fOMWgd1KPI2ccd4Eh3gw%3d%3d!%7d%7d%7d</p>
Appendix 4	<p>Nyes Wharf Committee Report</p> <p>Link (please copy and paste into your browser): http://modern.gov.southwark.gov.uk/documents/s77120/Item%203%20-%20Report%2017AP4596.pdf</p>
Appendix 5	<p>Nyes Wharf Site Plan</p> <p>Link (please copy and paste into your browser): http://modern.gov.southwark.gov.uk/documents/s77122/Item%203%20-%20Site%20Plan%2017AP4596.pdf</p>
Appendix 6	<p>Nyes Wharf GLA Stage 2</p> <p>Link (please copy and paste into your browser): http://planbuild.southwark.gov.uk/documents/?GetDocument=%7b%7b%7b!IcZBq6ONArS%2fmPIlr0JRA%3d%3d!%7d%7d%7d</p>
Appendix 7	<p>GLA Mortgagee in Possession Practice Note – January 2019</p> <p>Link (please copy and paste into your browser): https://www.housing.org.uk/globalassets/files/resource-files/gla_practice_note_mortgagee_in_possession_january_2019.pdf</p>

AUDIT TRAIL

Lead Officer	Simon Bevan, Director of Planning	
Report Author	Colin Wilson, Head of Regeneration, Old Kent Road	
Version	Final	
Dated	20 April 2020	
Key Decision	No	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments included
Strategic Director of Finance and Governance	No	No
Strategic Director of Environment and Leisure	No	No
Strategic Director of Housing and Modernisation	No	No
Director of Regeneration	No	No
Date final report sent to Constitutional Team		23 April 2020