

Item No: 6/7.1	Classification: Open	Date: 4 May 2020	Meeting Name: Planning Committee
Report title:		Addendum report Late observations and further information	
Ward(s) or groups affected:		Old Kent Road	
From:		Director of Planning	

PURPOSE

1. To advise members of observations, consultation responses and further information received in respect of the following planning applications on the main agenda. These were received after the preparation of the report and the matters raised may not therefore have been taken in to account in reaching the recommendation stated.

RECOMMENDATION

2. That members note and consider the late observations, consultation responses and information received in respect of each item in reaching their decision.

FACTORS FOR CONSIDERATION

Item 6 - Malt Street and Nyes Wharf s106 clause

Additional applicant representation

3. Peabody has submitted a statement in respect of the proposed MIP which is attached.

Objection

4. The 35% group have objected to the scheme on the grounds that the clause should not be agreed to as it would mean that the affordable housing associated with this scheme may in certain circumstances be lost, and that this clause is only being sought as means to allow Peabody to borrow more money. In addition consultation should be extended to those who objected to both the Nyes Wharf and Malt Street schemes as had the affordable offer not been in perpetuity committee may not have agreed this scheme. The objection is attached.
5. The Southwark Law Centre has objected on similar grounds. They have stated that there is no policy basis for accepting the clause, that there is no precedent for the clause, it wouldn't deliver additional affordable housing in this scheme or LBS and there is no evidence of the mechanism of purchase or costs should the clause be triggered. In addition if Peabody were not to proceed why can't Berkeley find another RP or why can't LBS purchase the affordable homes.

Officer response

6. All planning permissions issued by Southwark (and all other London Boroughs) contain a MIP clause. That standard Southwark MIP clause has always allowed for the provision that should the Registered Provider go into administration, and the homes they own fail to find a buyer during the moratorium period, (when they are offered for sale at “affordable housing market value”) then the requirement for them to remain affordable “in perpetuity” would fall away. The Council itself is perhaps the most likely buyer and Southwark has of course purchased a number of affordable units in recent years on completed schemes to contribute towards the commitment for new council homes. This clause has never been triggered in Southwark or any other London borough. S106 clauses with this provision have been in use in LBS over at least the last 30 years in all s106 affordable housing schemes.
7. The change in wording to the MIP would allow the Registered Provider to borrow more money, to deliver more affordable housing. This is the sole motivation behind the GLA introducing this clause. This is the reason officers are recommending its adoption. However, in the unlikely event of a corporate failure costs could escalate and the amount to redeem the mortgage could exceed the value as affordable housing.
Berkeley Homes and Peabody have spent the last year negotiating an agreement, other large G15 RPs who could partner on this site are seeking similar MIP clauses as they all took part in formulating the GLA note. LBS are investing directly in affordable provision in Old Kent Road, as part of its own council house building programme and through the purchase of sites. But in order to deliver the number of homes required RPs will also be required to contribute through their investment.

Correction to paragraph 13

8. The last sentence states that representatives from London Councils took part and London Councils endorsed the note. GLA have subsequently confirmed that it was representatives of the London Authorities Viability Group and National Housing Federation Property Finance Working Group who attended and endorsed the note.

Correction to paragraph 14

9. In paragraph 14 of the committee report it states:

“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.”

10. It is in fact the case that both the standard LBS and GLA clause allow for this eventuality.

The key difference between the GLA and LBS clause is the wording in the second paragraph of the committee report:

“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;

This would allow a lender to recover their loan, and is the reason they are willing to lend more money.

Amendment to the Standard GLA clause

11. Members had expressed concerns that should a MIP clause ever be triggered it would be important that LBS should be prioritised as the party given the first opportunity to buy the affordable housing during the moratorium period. Following discussion with Peabody they have agreed to further amendments as follows;

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, Chargee 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 pursuant to clause [below].

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, Chargee 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.”

G15 Registered Provider Investment in Old Kent Road

12. Members have asked for information in respect of investment by Registered Providers in Old Kent Road which is attached. As can be seen to date there are consents for G15 RPs to provide over 1100 affordable homes in the Old Kent Road. Of note is that where Housing Associations are buying sites in their entirety they are increasing the affordable quantum.
13. 62 Hatcham Road, 180 Ilderton Road and 636 Old Kent Road have increased from 35% affordable as approved to 100% affordable. Nyes Wharf has increased from 37% to 40%. 57 Glengall Road has increased from 35% to 50%. 2 Varcoe Road may also increase to 100% affordable.

Item 7.1 – 18/AP/2497 – 79-161 Ilderton Road, London SE16 3JZ.

Additional comments received

14. London Fire Brigade: Satisfied with the proposals in relation to the fire precautionary arrangements, this includes fire-fighting access and water supplies.

Amendment to condition 25 BREEAM:

15. The condition incorrectly refers to the required BREEAM standard for the proposed development to be “very good”. It should read “excellent”. The applicant has confirmed it can meet “excellent”.

Minor correction to para 2 of officer report:

16. In the event that the requirements of a) are not met. Should read: In the event that the requirements of 1) are not met.

REASON FOR URGENCY

17. Applications are required by statute to be considered as speedily as possible. The application has been publicised as being on the agenda for consideration at this meeting of the planning committee and applicants and objectors have been invited to attend the meeting to make their views known. Deferral would delay the processing of the applications and would inconvenience all those who attend the meeting.

REASON FOR LATENESS

18. The new information, comments reported and corrections to the main report and recommendation have been noted and/or received since the committee agenda was printed. They all relate to an item on the agenda and members should be aware of the objections and comments made

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Individual files	Place and Wellbeing Department 160 Tooley Street London SE1 2QH	Planning enquiries telephone: 020 7525 5403

APPENDICES

No.	Title
Appendix 1	Item 6 – email from the 35% Group
Appendix 2	Item 6 – email from Southwark Law Centre
Appendix 3	Item 6 – list of Housing Association Scheme
Appendix 4	Item 6 – Statement from Peabody



Blue Anchor Lane
London
SE16
<http://35percent.org/>

By email

27 April 2020

Cllr Martin Seaton
Chair
Southwark Planning Committee

Dear Cllr Seaton

Re Mortgagee in Possession s106 Briefing – Malt St and Nyes Wharf

A report on the above is to be presented to the planning committee on 4 May 2020, with the recommendation that the director of planning be given the authority to agree a Mortgagee in Possession (MIP) clause within the joint s106 agreement for the Malt St and Nyes Wharf development. Our understanding is that this clause would, in certain circumstances, allow the affordable housing to be lost.

While the report says that there is very little risk of this happening, agreeing to this clause is nonetheless a significant decision that raises the possibility of the affordable housing not being provided 'in perpetuity', contrary to the scheme approved by the planning committee.

The report notes that affordable housing 'in perpetuity' is a requirement of the 2008 Affordable Housing SPD, but only as a 'material consideration'. This may be factually correct, but it has nonetheless been axiomatic that affordable housing in Southwark is delivered 'in perpetuity'. The report instead casts the 'in perpetuity' requirement as technical matter and takes no account of the detriment and public concern there would be, should it cease to be provided 'in perpetuity'. It also gives no account of the likelihood of Southwark or another registered provider being in a position to take over the affordable housing, should the need arise.

It also appears from the report that Peabody and Berkeley Homes reached agreement on the MIP clause between themselves and are presenting Southwark with a 'fait accompli', under

the threat of a reduction in the affordable housing, by way of an appeal by Berkeley homes against non-determination.

In the particular case of Malt St, the delivery of 40% affordable housing was an important factor in the committee's decision to approve the application over serious objections, such as the loss of light industrial land. Had the offer not been 'in perpetuity' the committee may have reached a different conclusion. Objectors should therefore be allowed the opportunity to comment on this significant change to the scheme. This opportunity should be extended to those who objected to the Nye Wharfe scheme, now that the both are to be subject to the same s106 agreement.

For all these reasons we ask that the decision on this matter be deferred, to allow this consultation.

In any event, we object to this recommendation and ask that the committee refuse to give the authorisation requested.

Yours sincerely

Jerry Flynn

35% Campaign

Cllr Martin Seaton
Southwark Council
Chair - Planning Committee

By email only

30 April 2020

Dear Cllr Seaton

Mortgagee in possession S106 clause- Malt Street redevelopment

We write ahead of the virtual planning committee on 4 May 2020 and in particular item 6 which contains a recommendation that the director of planning be given the authority to agree a Mortgagee in Possession (MIP) clause within the joint s106 agreement for the Malt St and Nyes Wharf development.

We are very concerned about the recommendation set out in the Officer's report for the following reasons:

1. Firstly, there is no policy in the local plan or in the form of a supplementary planning document (notably the Affordable Housing and Viability SPD) to support the use of the mortgage in possession clause. The GLA note does not represent a GLA/London Plan policy;
2. The planning committee are being requested to approve a clause which may mean that the agreed affordable housing on this development will be lost and/or not provided in perpetuity, which is contrary to Affordable Housing and Viability SPG, which is at least a material planning consideration. There is no precedent or policy position for this to be allowed in a Southwark planning committee approved development;
3. The report states that the clause will increase the value of Peabody's capital assets, but it does not increase the delivery of affordable housing *in this development*. In actual fact, the committee are being asked to approve something which goes against a material planning consideration for no additional benefit to the existing planning permission grant, and consequently for people living in Southwark. Likely benefit to a planning application or planning permission for people living in Southwark should be the main concern of the planning committee members. This request provides no such benefit.

4. There is no mention of whether Southwark Council or another registered provider would actually be able to purchase the affordable housing units or interest were the named registered provider to default on the mortgage and/or go into administration, therefore this option does not appear to be a realistic one justified by evidence. There is no evidence or suggested mechanism of how this might work within the Officer's Report. Our understanding is that it will be greater than the 'market' affordable housing price i.e. the cost of any loan that used the a/h as security would also have to be met. There is also no mention of the tenure mix, and that the 25% social rented units would have to remain should the council or another registered provider be able to buy out the affordable units.
5. This is a significant change to the original planning permission grant, and therefore should be consulted on and should go through the same proper decision-making process as the original application which obtained the planning permission grant.
6. We are very concerned about a precedent being set and the assurances set out in the Officers Report do not allay these concerns. There is no reason why registered providers of affordable housing would not insist on the use of this clause in the future developments to increase the value in their capital assets if it is approved in this development.
7. No substantial reasons have been given as to why Peabody are saying this clause is non-negotiable, besides the fact that the value of their capital assets will increase and they may be able to deliver more affordable housing in the future. While this would obviously be a desirable outcome if it were to happen, we do not think it should be provided in return for a possible loss of affordable housing in this development. In addition, we are not sure why, and it has not be explained why, Berkley Homes would not be able to sell to another registered provider or indeed Southwark Council if this clause were not agreed and Peabody pulled out as the registered provider for this development.

In light of the serious issues raised, we request that this matter be deferred to allow proper consideration, and the consultation on the revised Affordable Housing and Viability SPD to take place.

If the matter is not deferred, please note that we request the right to speak in respect of this agenda item and it would be much appreciated if a representative of Peabody could answer some concerns.

Yours sincerely

Planning Voice
Southwark Law Centre

Housing Association within G15						
Housing Association	Site				status	
A2 Dominion	Ruby Triangle	4,301 sqm Public Space	48 Storeys	1,152 New Homes	<p>40.5% 451 Affordable Homes</p> <p>Tenure Split 25.15% Social 15.39% Intermediate</p> <p> 7374.95 sqm Existing</p> <p> 0 sqm Existing</p> <p>£29,883,946 £2,208,284</p> <p>SCIL/MCIL SECTION 106</p> <p>5328 sqm Proposed (flexible work + retail space)</p> <p>1,772 sqm proposed Church Hall & Gym 425 sqm proposed Church pre-provision</p>	Approved
Optivo	60-62A Hatcham Road	0 sqm Public Space	9 Storeys	86 New Homes	<p>100% 86 Affordable homes</p> <p>Tenure Split 25% Social 75% Intermediate</p> <p> 1,081 sqm Existing</p> <p> 0 sqm Existing</p> <p>£1,941,520 £294,806</p> <p>SCIL/MCIL SECTION 106</p> <p>1,185 sqm Proposed</p> <p>0 Proposed</p>	On site
Optivo	180 Ilderton Road	0 sqm Public Space	9 Storeys	84 New Homes	<p>100% 84 Affordable Homes</p> <p>Tenure Split 25% Social 75% Intermediate</p> <p> 3,328 sqm Existing</p> <p> 0 sqm Existing</p> <p>£1,538,170 £316,588</p> <p>SCIL/MCIL SECTION 106</p> <p>2,351 sqm Proposed</p> <p>0 Proposed</p>	On site
Optivo	2 Varcoe Road	0 sqm Public Space	9 Storeys	74 New Homes	<p>35.1% 24 Affordable Homes</p> <p>Tenure Split 25.1% Social 10% Intermediate</p> <p> 0 sqm Existing</p> <p> 0 sqm Existing</p> <p>£41,982 £108,154</p> <p>SCIL/MCIL SECTION 106</p> <p>288 sqm Proposed</p> <p>0 Proposed</p>	Approved
Southern Housing	49-53 Glengall Road	851 sqm Public Space	15 Storeys	181 New Homes	<p>50% 61 Affordable Homes</p> <p>Tenure Split 50% Social 50% Intermediate</p> <p> 3560 sqm Existing</p> <p> 0 sqm Existing</p> <p>£4,066,723 £232,548</p> <p>SCIL/MCIL SECTION 106</p> <p>3,885 sqm Proposed</p> <p>0 Proposed</p>	Approved
Peabody	Nye's Wharf	765 sqm Public Space	18 Storeys	153 New Homes	<p>40% 54 Affordable Homes</p> <p>Tenure Split 25% Social 15% Intermediate</p> <p> 0 sqm Existing</p> <p> 0 sqm Existing</p> <p>£3,304,879 £931,304.78</p> <p>SCIL/MCIL SECTION 106</p> <p>1193 Proposed</p> <p>0 Proposed</p>	Approved
Peabody	Malt Street	7080 sqm Public Space	44 Storeys	1300 New Homes	<p>40% 397 Affordable Homes</p> <p>Tenure Split 25% Social 15% Intermediate</p> <p> 4188 sqm Existing</p> <p> 0 sqm Existing</p> <p>£35,269,117 £548,341</p> <p>SCIL/MCIL SECTION 106</p> <p>4513 sqm (Proposed flexible work + retail space)</p>	Approved

Housing Associations Outside G15						
Housing Association	Site				Status	
Hexagon	634-636 Old Kent Road	0 sqm Public Space	6 Storeys	42 New Homes	<p>100% 42 Affordable Homes</p> <p>Tenure Split 50% Social 50% Intermediate</p> <p> 1,333 sqm Existing</p> <p> 50 sqm Existing</p> <p>£41,982 £108,154</p> <p>SCIL/MCIL SECTION 106</p> <p>272 sqm Proposed (flexible work + retail space)</p>	On site

Totals	
Total affordable homes from G15 housing Associations	1157
Total for all Housing Associations	1199



Committee Members
London Borough of Southwark
Committee Meeting, 4th May 2020
Agenda Item 6

Dear Members,

Please see below supplementary information ahead of the meeting next week:

Peabody have over **3000 homes and 10,000 residents** in LB Southwark. The Malt Street scheme alone represents an additional **500 affordable homes**.

Malt Street/Nyes Wharf

Malt Street/Nyes Wharf are two linked planning application schemes which have resolution to grant and which deliver over 1400 homes including over 500 affordable homes for local people. The Council has granted permission for both schemes, subject to a S106 agreement; however an impasse has been reached in negotiations between Berkeley Homes, Peabody and the London Borough of Southwark over the wording of the S106; specifically the Mortgagee in Possession (MIP) clause.

What is a Mortgagee in Possession clause and why is it important?

MIP clauses are a standard form of drafting which are common to all S.106 Agreements and are consistently used by Local Authorities, including Southwark. They enable Registered Providers (RP's) to provide for the extraordinary circumstances where a RP defaults on loan payments or other loan/mortgage terms and 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. As far as we are aware there are no known cases where the MIP clause has been activated.

The clauses allow for another RP, or Local Authority, to purchase the affordable housing units within a specified timeframe known as the 'moratorium period' under a prescribed procedure. 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 the loan that they have provided. MIP clauses are standard within s106 agreements, this is certainly not a new concept for LB Southwark.

Peabody, along with other RPs, has been delivering affordable homes in Southwark and across London for many years. We have moved from a 65% grant funding model in the late 1980s to a model where over time grant has been reduced to circa 20% of the cost of an affordable home. The delivery of affordable homes by RPs is now enabled by cross-subsidy from delivering homes for sale and in securing private finance. MIP clauses have proved to be quite problematic for the sector, due to the impact that they can have on RP's ability to secure funding and, in turn, deliver new affordable homes. The value that a lender will fund at is restricted by the MIP clause. Clauses agreed in the past have meant that lending have been restricted to a level that over time would impact on an RP's ability to carry on developing affordable housing.

The problem was such that recently the G15 Registered Providers Group worked with the GLA to develop and put in place a *standard clause* that allows RP's to be able to deliver new affordable products while still being able to draw down sufficient new debt - thus ensuring that, as a sector, we are able to carry on delivering much needed future, additional affordable homes.

RP's now, more than ever, rely on private finance to build more homes, to address the urgent housing crisis. This therefore makes the topic of identifying the issues that impact the housing associations funding values more pressing. The overriding objective of MIP clause is to protect banks, such that the mortgagee is protected from being bound by onerous s106 obligations, without which funding cannot be secured or would be severely limited. This is a funding point, not a planning one.

After many months of negotiations, Peabody have conceded to move forward with a 'hybrid clause' which, whilst not the preferred GLA wording, captures the spirit of the GLA drafting.

Current Position

We estimate that with the hybrid GLA/LBS clause in place Peabody would have the ability to borrow up to £104m, as the loan on the properties would be secured at 65% of market values. On the other hand with the standard LBS clause in place we would only be able to borrow c.£24m (15% of market value). Thus, we would be prevented from accessing up to £80m, money which could be used to acquire much needed affordable housing across London.

Conclusion

Peabody have been providing homes for vulnerable Londoners for over 150 years. The strength of our covenant is unparalleled in the sector. The almost inconceivable 'perfect storm' of circumstance that would mean that Peabody could feasibly be in danger would be where all of our development partners went insolvent at the same time, sales values dropped to virtually zero and the GLA recalled all of their loans. It is arguable that even then, Peabody could survive. This surely demonstrates irrefutably the likelihood of the MIP clause being triggered.

As a sector the protection of affordable assets for the long term is one of the most important principles we abide by. As such we are regularly tested to ensure that not only are we all able to survive particularly extreme disaster case scenarios, but to also put in place living wills that would allow another RP to step in if the worse was ever to happen to an RP. While we appreciate and agree with the councils view that the protection of affordable housing in the long term is essential we do need to act responsibly to ensure that we are doing as much as possible to grow the affordable housing supply in the long term.

We hope that Members will accept that our requirements are reasonable and will agree to the clause as agreed between LBS Officers, Berkeley and Peabody, as Berkeley are now ready to submit reserved matters as soon as the planning consent is issued and commence development of the first phase.