



**Report to:** Joint Development Control Committee 17 September 2021  
**Lead Officer:** Joint Director of Planning and Economic Development

## **21/01507/S106A – Queen Edith's (1-74 Warburton House Vawser Way Cambridge Cambridgeshire CB2 0AA)**

Proposal: Modification of planning obligations contained in a Section 106 Agreement dated 14th December 2010 pursuant to ref: 06/0795/OUT

Applicant: Bpha Limited

Key material considerations: Planning obligations  
Affordable Housing

Date of Member site visit: n/a

Is it a Departure Application?: No

Decision due by: n/a

Application brought to Committee because: the application is a variation to a Section 106 agreement, which is not delegated under 1(i) of the JDCC scheme of delegation.

Presenting officer: Charlotte Burton (Principal Planner, Strategic Sites)

### **Executive Summary**

1. This application seeks the modification of planning obligations for Warburton House at Ninewells contained in a Section 106 Agreement dated 14 December 2010 pursuant to outline planning permission 06/0795/OUT.
2. The scheme approved under 06/0795/OUT provides for development of up to 347 dwellings with 40% affordable homes, as well as student accommodation.

3. The current application made by the affordable housing provider, Bpha Limited, seeks an amendment to clause 6.5 relating to the disposal of affordable housing to replace it with a standard conditional Mortgagee Exclusion Clause. This standard clause has been developed by the industry to protect the mortgagee should the borrower default on its loan. This benefits the affordable housing provider Bpha Limited by uplifting the value of their housing stock.

## Relevant planning history

4. **06/0795/OUT** - Residential development not exceeding 347 dwellings (comprising houses and apartments, including affordable and key worker housing), 100 bed student living accommodation for the Bell Language School and public open space, with vehicular access from Babraham Road and associated roads, footpath/cycleways and drainage infrastructure. **Approved subject to conditions and Section 106 Agreement.**

**11/0918/REM** - Reserved matters for access from Babraham Road to serve residential development (outline planning permission 06/0795/OUT). **Refused and Appeal Dismissed.**

**12/0890/REM** - Reserved matters submission for vehicular access from Babraham Road, including details required under condition 28, pursuant to outline approval 06/0795/OUT. **Refused and Appeal Allowed.**

**12/1027/S73** - Variation of Conditions 29 and 39 of 06/0795/OUT for residential development not exceeding 347 dwellings (comprising houses and apartments, including affordable and key worker housing), 100 bed student living accommodation for the Bell Language School and public open space, with vehicular access from Babraham Road and associated roads, footpath/cycleways and drainage infrastructure. **Approved subject to conditions.**

**13/1118/S73** - Variation of conditions on existing outline permission (reference 12/1027/S73 dated 1 November 2012): conditions 3 (reserved matters), 4 (masterplan), 5 (parameter and access plan), 28 (access details), 30 (link to Greenlands) and 32 (access plan), attached to outline permission for residential development not exceeding 347 dwellings (comprising houses and apartments, including affordable and key worker housing), 100 bed student living accommodation for the Bell Language School and public open space, with vehicular access from Babraham Road and associated roads, footpath/cycleways and drainage infrastructure. **Approved subject to conditions and Deed of Variation to the Section 106 Agreement.**

**13/1786/REM** - Reserved matters application (access, appearance, landscaping, layout and scale) pursuant to outline permission 13/1118/S73 for 270 dwellings (including Affordable Housing), 100 bed student accommodation for Bell Language School, public open space, associated roads, footpaths/cycleways and drainage infrastructure. **Approved subject to conditions.**

## **Planning policies**

### 5. Relevant Development Plan policies

PLAN	POLICY NUMBER
Cambridge Local Plan 2018	45 Affordable housing and dwelling mix

### 6. Relevant Central Government Guidance, Supplementary Planning Documents and Material Considerations

Central Government Guidance	National Planning Policy Framework 2021 National Planning Policy Framework – Planning Practice Guidance from 3 March 2014 onwards
Previous Supplementary Planning Documents  (These documents, prepared to support policies in the 2006 local plan are no longer SPDs, but are still material considerations.)	Affordable Housing (January 2008)

## **Consultations**

### **Cambridge City Housing Strategy**

7. No objection. The suggested change accords with the National Housing Federation agreed re-wording of this clause and one that we have accepted on other s106 variations. The clause can be referred to as a Mortgagee Exclusion Clause (as sought) or Mortgagee Protection Clause (as mentioned in the following background). Housing are supportive of the specific clause sought by the Applicant. Helpful background for why the replacement clause is supported:

- a) A Securitisation Working Group (SWG) made up of various sector stakeholders has formulated an example mortgagee protection clause which should allow housing associations to obtain Market Value Subject to Tenancy (MVS-TT) when using Section 106 assets as loan security.
- b) The Group have been working to agree a consistent approach to the mortgagee protection clause (“MPC”) within Section 106 Agreements to

ensure that housing associations can achieve best possible funding value when securing loans against the assets.

- c) The intention behind an MPC is to protect the funder and anyone acting on behalf or for the funder and to be able to carry out its duty as a mortgagee, should a borrower default on its loan. Where the MPC does not provide sufficient protection for the funder and they would be bound by the affordable housing restrictions in the Section 106 Agreement, the value would be limited to Existing Use Value for Social Housing ("EUV-SH"). The best possible funding value is Market Value Subject To Tenancies ("MV-STT"), where the funder would be able to sell on the open market, to either a housing association or a non-regulated purchaser; and neither the lender nor successors in title would be bound by the affordable housing restrictions in the S106 Agreement.
  - d) The Group agreed a "sector approach" to MPC in 2015 with a view to agreeing an example of how associations could obtain MV-STT on assets being used for private finance. This has now been amended, given the recent discussions around deregulation measures and the new Housing and Planning Bill on the brink of being agreed, and the Group have agreed an amended "sector approach" to reflect the potential appointment of a "housing administrator" with a view to trying to future proof this as far as foreseeable.
  - e) The endeavours of the Group are fundamental to enabling housing associations to secure the funds needed to build the homes to end the housing crisis.
8. The above responses are a summary of the comments that have been received. Full details of the consultation responses can be inspected on the application file.

## **Representations**

9. No third-party representations have been received.

## **Site Description/Area Context**

10. The Ninewells development is located within the Bell School Area of Major Change, on the Cambridge City Southern Fringe, south of Addenbrookes and west of Babraham Road. Outline permission (planning reference 06/0795/OUT) was granted for a development of up to 347 dwellings with 40% affordable homes as well as student accommodation.

11. Warburton House provides 74 retirement apartments restricted to occupiers of 55 years old and over including a mix of 1-bed and 2-bed flats designed for accessible features and communal facilities. This includes a mix of social rent and shared ownership apartments. It forms one element of the affordable housing provision on Ninewells, which includes a further 34 flats and houses.

## **The Proposal**

12. The proposal seeks the modification of planning obligations contained in a Section 106 Agreement dated 14 December 2010 pursuant to planning consent 06/0795/OUT as follows: -

Amend Clause 6.5 of the Section 106 Agreement by replacing it with a conditional Mortgagee Exclusion Clause.

13. The modification is sought align the clause with an agreed industry approach that has developed since the Section 106 agreement was signed. The new clause would allow the properties to be valued at open market rates when the housing provider is securing the property to a lender. This would allow the housing provider to realise the full equity of its stock to reinvest in affordable housing.

14. The current clause states:

6.5 In respect of each Affordable Housing Site a mortgagee or receiver appointed by such mortgagee acting pursuant to the terms of a legal charge or mortgage shall be entitled to dispose of the Affordable Housing Site or relevant part thereof free from the provisions of this Deed subject to the following conditions having been discharged;

6.5.1 the mortgagee or receiver appointed by such mortgagee notifying the City Council in writing immediately the mortgagee has an enforceable power of sale;

6.5.2 the mortgagee or its receiver having used its reasonable endeavours to dispose of the mortgaged Affordable Housing Site to an Approved AHP nominated by the City Council;

6.5.3 if the mortgagee or its receiver has not entered into a contract to dispose of the said Affordable Housing Site in accordance with the provisions in this Clause 6 within 6 months of notifying the City Council pursuant to Clause 6.5.1 the mortgagee or its receiver may dispose of the Affordable Housing Site on the open market to a willing buyer or buyers free from the provisions of this Deed and any land which is so disposed of shall be free from the provisions of this Deed.

14. The proposed amended wording states:

The [affordable housing provisions] in this Agreement [DN: cross-referencing the specific provisions would be preferable] shall not be binding on a mortgagee or chargee or any receiver (including an administrative receiver appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (each a Receiver)) of the whole or any part of the [affordable dwellings] or any persons or bodies deriving title through such mortgagee or chargee or Receiver PROVIDED THAT:

(1) such mortgagee or chargee or Receiver shall first give written notice to the Council of its intention to dispose of the [affordable dwellings]; and

(2) shall have used reasonable endeavours over a period of three months from the date of the written notice to complete a disposal of the [affordable dwellings] to another registered provider or to the Council for a consideration not 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; and

(3) if such disposal has not completed within the three month period, the mortgagee, chargee or Receiver shall be entitled to dispose of the [affordable dwellings] free from the [affordable housing provisions] in this Agreement which provisions shall determine absolutely

## **Publicity**

13. Advertisement:	Yes (by Applicant)
Adjoining Owners:	No
Site Notice Displayed:	Yes

## **Assessment**

15. From the consultation responses and representations received the main issues are as follows:

- Affordable Housing
- Planning Obligations (s106 Agreement)

## **Affordable Housing**

16. Policy 45 of the Cambridge Local Plan 2018 requires 40% affordable housing where the development is for 15 or more units. The proposed amendments would not reduce the amount of affordable housing retained for this site compared to the provisions of the existing Section 106 Agreement.

## **Planning Obligations**

17. The proposed variation seeks to amend clause 6.5 of the Section 106 Agreement to the Property Finance Working Group Standard Mortgagee Exclusion Clause. This variation has been developed to increase the value of the properties for affordable housing providers when securing loans against the assets. Ultimately, this will allow providers to build more affordable homes.

18. Currently the properties would receive an Existing Use Value – Social Housing (EUV-SH) that assumes a property may only ever be used as social/affordable housing in perpetuity. This restricts the value of the property to approximately a third of the open market value. The proposed re-wording would enable the properties to receive a Market Value – Subject To Tenancy valuation (MV-STT).

19. To receive this valuation the Section 106 Agreement Mortgagee Exclusion Clause needs to effectively carve out any ongoing requirement for a lender in possession to use the property as affordable housing. However, the proposed amended wording would still require the Affordable Housing Provider to notify the Council of its intention to dispose of the affordable housing, and make reasonable endeavours to dispose of the housing to another registered provider or the Cambridge City Council for three months prior to disposing of the housing free from compliance with the affordable housing provisions.
20. The Affordable Housing team at Cambridge City Council support the variation to the wording and advise that the reduction in the notice period from 6 months to 3 months reflects the much tighter financial restrictions that Registered Housing Providers work under at present compared with when the original drafting was prepared. They advise that the proposed Mortgagee Exclusion Clause (MEC) is the same as a Mortgagee Protection Clause (MPC) and that they are supportive of the specific version sought by the Applicant.
21. It is considered that the amended wording retains sufficient protection for the retention of the affordable housing. The variation request does not seek to change the affordable housing provision and the Section 106 Agreement would remain in accordance with policy 45.

## **Conclusion**

22. The application does not materially alter the affordable housing provision for this development and seeks to benefit the affordable housing provider, it is considered that the amendments to the Section 106 Agreement dated 14 December 2010 in relation to planning consent reference 06/0795/OUT should be approved.

## **Recommendation**

**APPROVE** the application subject to completion of the Deed of Variation to the Section 106 Agreement, with delegated authority to officers to agree the wording of the Deed of Variation.