

Date of Meeting Tuesday 20 October 2020

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Exemption applied: None

Review date for release N/A

Affordable Housing Supplementary Planning Document and Mortgagee Exemption Clauses

Report summary:

This report outlines the responses received during the second round of public consultation on the Draft Affordable Housing Supplementary Planning Document (SPD) (January to February 2020), and show how these comments have been taken into account in revising the SPD. The proposed final version of the Affordable Housing SPD is presented to this Committee to consider and recommend its adoption at Cabinet. In addition, the report seeks to streamline the approval of changes to mortgagee exemption clauses in existing s106 agreements

Recommendation:

Members are asked:

- 1. To note the comments received during the second round of public consultation on the Draft Affordable Housing Supplementary Planning Document and endorse the council response.**
- 2. To consider and recommend to Cabinet that the Affordable Housing Supplementary Planning Document attached at Appendix A is adopted.**
- 3. To recommend to Council that the constitution be amended to add “Deeds of variation to amend mortgagee exemption clauses in line with the securitisation working group template clause” to the list of other planning delegations to the Service Lead (Planning Strategy and Development Management).**

Reason for recommendation:

To make Members aware of the responses received during the second round of public consultation on the Draft Affordable Housing SPD, and show how these have been taken into account. Members can then consider and recommend the SPD to Cabinet for adoption. Finally, to enable changes to mortgagee exemption clauses to be dealt with more efficiently, aiding the delivery of affordable housing.

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Portfolio(s) (check which apply):

- Climate Action
- Corporate Services and COVID-19 Response and Recovery
- Democracy and Transparency
- Economy and Assets
- Coast, Country and Environment
- Finance
- Strategic Planning
- Sustainable Homes and Communities

Financial implications:

There are no specific financial implications impacting upon council finances within the report.

Legal implications:

Planning obligations are contained in legal agreements set out as deeds under section 106 and s106A of the Town and Country Planning Act 1990, as amended. Once adopted the Affordable Housing SPD will form a material consideration in the determination of planning applications. Other legal implications are as set out in the report.

Equalities impact Low Impact

An Equalities Impact Assessment of the Affordable Housing SPD has been prepared, which identified that there would be no adverse impacts upon those people with “protected characteristics”. There would be positive impacts upon “age” through encouraging affordable housing provision for young people to buy and rent, and “disability” through guidance on enhanced standards for accessible and adaptable homes.

Climate change Low Impact

Risk: Low Risk; The SPD is being prepared in accordance with plan-making regulations, the council agreed protocol for preparing SPDs, and the adopted Statement of Community Involvement.

Links to background information [Strategic Planning Committee, Monday, 9 December 2019, Agenda and minutes, item 37 East Devon Local Plan 2013-2031 East Devon Local Development Scheme \(July 2018\)](#) [Supplementary Planning Guidance Protocol National Planning Policy Framework Affordable Housing SPD – Consultation Statement](#) [Affordable Housing Supplementary Planning Document for adoption – Appendix A](#)

Link to [Council Plan](#):

Priorities (check which apply)

- Outstanding Place and Environment
- Outstanding Homes and Communities
- Outstanding Economic Growth, Productivity, and Prosperity
- Outstanding Council and Council Services

Report in full

Background

1. Members will be aware that the East Devon Local Plan promotes the delivery of affordable housing in appropriate locations, through policies relating to affordable housing targets and tenures (Strategy 34) and rural exception sites (Strategy 35). On sites of 10 or more homes, all affordable housing should meet accessible and adaptable dwellings standards (Strategy 36).
2. The Local Development Scheme – essentially, the planning policy work programme – states that an Affordable Housing supplementary planning document (SPD) will be prepared to elaborate on policy to secure affordable housing provision in East Devon. This will provide greater clarity to developers and communities about our expectations for affordable housing delivery. By giving clear guidance upfront about issues such as tenure mix, how vacant building credit will be operated, the ‘pepper-potting’ of affordable units in a development, and where off-site contributions will be appropriate, it will enable developers and landowners to better understand policy requirements. Therefore, the SPD should assist applicants when making planning applications, and the council in determining them. However, it is important to note that SPDs can only add further detail to policies in the Local Plan, and cannot set policies themselves.

3. This Committee approved the first round of public consultation on a draft Affordable Housing SPD back in March 2019. The consultation responses and subsequent changes to the SPD were discussed by this Committee in December 2019, approving a second round of public consultation which took place from 14 January to 28 February 2020. The SPD was accompanied by an 'interim' Consultation Statement, a Screening report for Strategic Environmental Assessment and Habitats Regulations, and an Equalities Impact Assessment.

Responses received in the second round of public consultation (Jan-Feb 2020) and how they have been taken into account

4. The accompanying Consultation Statement (chapter 3) states who we consulted and how, including all parish councils, numerous planning agents, Registered Providers operating in East Devon, and around 2,300 individuals who had expressed an interest in planning policy matters.
5. A total of 22 responses were received in the second round of public consultation on the Draft Affordable Housing SPD.¹ The Consultation Statement includes a response to each of the comments made. Some of the main issues raised in consultation are set out below (by chapter):

Thresholds and targets

- Object to the overage clause as it causes delay, uncertainty, and is not an effective basis for delivery.
- Concern about references to negotiation and viability testing after planning permission has been granted – the level of affordable housing should not be reduced.
- Support the thresholds as it aligns with the NPPF and allows applicants to justify where it would not be appropriate to meet affordable housing targets.
- Does not cover the potential to change the mix of tenures before lowering the amount of affordable housing.
- Welcome the text on determining an acceptable return for landowners, and removal of reference to an arbitrary 20% uplift on existing use value.

Tenure and mix

- Tenure mix is expressed as a target, so the need to justify an alternative mix will not simply be related to viability but could include a range of circumstances.
- Delete reference to the Council's priorities for shared ownership, relevant equity loans, and other low cost homes for sale; as this limits opportunities to meet housing need.
- NPPF para 64 requires 10% of the total number of dwellings to be for affordable home ownership – this is largely reflected in the SPD, but clarification is needed.

Design and layout

- Do not support the inclusion of a phased approach to the delivery of affordable housing alongside market housing as this is unduly restrictive.
- Suggest that larger clusters are allowed in larger sites.
- Support a stronger reference to National Space Standards within the document.
- Reference to National Space Standards should be removed as it introduces uncertainty for developers, and the council has not adopted policy on this.

Rural exception sites

- The section on rural exception sites appears helpful in confirming what is expected in terms of housing needs survey and access to services and facilities.

¹ The comments received can be seen in full on our website: <https://eastdevon.gov.uk/planning/planning-policy/housing-issues/affordable-housing/>

Pre-application, legal agreements and occupancy

- Welcome the reference to those with a connection to Exeter, but suggest this could also include Mid Devon.

Other issues

- Devon County Council will seek developer funding towards transport and education improvements from all housing, including affordable units.
 - Should identify the huge variations from settlement to settlement in the need/supply of affordable housing to ensure the housing is provided where it is needed.
 - Important that the cost implications of the delivery of strategic sites are explicitly referenced, which could be a reason for reduced affordable housing.
6. Several, relatively minor, changes have been made to the SPD as a result of the comments made, as detailed in the Consultation Statement. An overview of the proposed council response to the comments is set out in the following paragraphs.
 7. Overage is a requirement of the Local Plan where affordable housing levels fall below policy targets, which cannot be changed through the SPD. The level of affordable housing can be reduced where there are viability issues, but the SPD has been amended to more clearly say that changes to tenure mix will be considered before lowering overall levels of affordable housing, making clear that the tenure mix in the policy is a target.
 8. It is acknowledged that evidence for East Devon is currently lacking for some of the products in the latest NPPF definition of affordable housing, so we will consider any up-to-date evidence rather than setting priorities without this evidence. It is not entirely clear whether the NPPF (para 64) requirement for at least 10% of homes on major development as affordable home ownership relates to 10% of all homes, or 10% of the affordable homes. However, in light of consultation responses, further clarity in the Housing White Paper, and approaches being taken by other local authorities, it is considered that national policy is that 10% of all homes on major development should be available for affordable home ownership.
 9. It is important to include guidance on phasing for the effective delivery of affordable housing, but a minor change to the SPD will help make clear that the identified phasing is something the council will aspire to, rather than a stringent requirement. Larger clusters (than 10 dwellings) of affordable homes can come forward where necessary and able to promote social cohesion and a mixed and balanced community. The SPD does not require Nationally Described Space Standards – these can only be introduced in a local plan.
 10. In terms of occupancy, there is an issue regarding local connection which has arisen in respect of the strategic sites on the edge of Exeter – whilst the administrative boundary divides these sites from Exeter, there is no obvious boundary ‘on the ground’, so connections to Exeter should be allowed. This particular issue does not apply for Mid Devon, but sites elsewhere in East Devon can consider those with a connection to the county of Devon. If no-one can be found in Devon, then connections with adjacent counties will be considered.

Next steps

11. The Affordable Housing SPD has been amended as appropriate in light of comments received, and the final version is presented to this Committee to consider and recommend to Cabinet for adoption. The SPD will then be used to assist applicants and the council in considering affordable housing issues and making decisions on planning applications. The SPD should also be helpful for communities when preparing neighbourhood plans.
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Mortgagee Exemption Clause

12. We are seeing increasing numbers of requests to change the ‘mortgagee exemption’ clause (also known as ‘mortgagee in possession’ clause) on developments. This clause is a technical part of the S106 agreement which protects the bank/building society who are providing a mortgage/funding for affordable housing units. The wording of the mortgagee exemption clause affects the amount of funds that can be borrowed against each property (known as “charging”), which then impacts on the number of new affordable homes a Registered Provider (RP) can deliver. A poorly worded clause may prevent charging completely.
13. RPs use their stock or assets as security for new borrowing – the mortgagee exemption clause ensures that RPs can achieve best possible funding value when securing loans against the assets. The funds are needed for the RP to build more affordable homes. The key to delivering more affordable homes is making funding available – RPs are increasingly reliant on private finance to fund development of new housing stock.
14. The councils’ duty is to ensure the provision of affordable housing, making sure they remain as affordable units in perpetuity. The risk to the council is that if a RP gets into financial difficulty, the lender can then sell the affordable units free from the affordable housing restrictions, meaning that affordable housing is lost. However, in reality, it is very unlikely that a RP would get into this position in the first place as Homes England would likely intervene – we are not aware of any instances of a lender selling affordable homes on the open market.
15. The mortgagee exemption clause protects the lender if the RP defaults (e.g. insolvency) by allowing them to sell the affordable homes for market value after a 3 month timeframe if another Registered Provider has not purchased the units. Where the mortgagee exemption clause does not provide sufficient protection, lenders would be bound by the affordable housing restrictions in the S106 Agreement, thereby limiting the value to Existing Use Value for Social Housing (EUV-SH). The best possible funding value is Market Value Subject To Tenancies (MV-STT), which allows the lender to sell the houses on the open market, to either a RP 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. As an example, the table below shows how the mortgagee exemption clause works, comparing the two funding values that would apply for 100 dwellings.

What difference does a mortgagee exemption clause make to housing delivery – comparison of funding values for 100 dwellings

Clause	Borrowing amount	Total funding raised (borrowing amount x 100 dw)	Dwellings built (assuming total build cost of around £193k)
Market Value Subject To Tenancies (MV-STT) – new clause	£95,000 per property	£9.5m	49
Existing Use Value for Social Housing (EUV- SH) – restrictive clause	£50,000 per property	£5m	26

16. The example above demonstrates how the new clause enables the RP to borrow more against property and this then enables them to build more affordable homes, compared to the restrictive clause.

17. A securitisation working group made up of various sector stakeholders wanted to agree a consistent approach to the mortgagee exemption clause within S106 agreements, to ensure that RPs can achieve best possible funding value when securing loans against the assets. A standard clause has been developed by the group and is now used by many local authorities, including by EDDC in all new S106 agreements.
18. The amendment of the mortgagee exemption clause in existing S106 agreements requires a Deed of Variation. The current procedure is for a formal request to be made to the relevant Planning team. They then consult with Housing and write a report for Ward member approval. Once the Ward member(s) have agreed to the change this is then signed off by the Development Manager. Legal is then instructed to draft a Deed of Variation.
19. As this is a common request, and the principle behind the change is accepted by the Housing, Legal and Planning teams, this report recommends that any future requests for amending the mortgagee exemption clause in existing s106 agreements to the securitisation working group standard template are agreed under delegated powers. There will still need to be a deed of variation but the approval of ward members will no longer be required. This would be a much more efficient way of working, and enable the planning department to process these requests in the knowledge that the principle of removing these clauses is acceptable in principle. This will aid in the delivery of affordable homes in East Devon.