



## Cambridge Sub-Region

### Improving the Use of Section 106 Agreements to Deliver Affordable Housing



MARCH 2009

## **CAMBRIDGE SUB-REGION**

### **IMPROVING THE USE OF SECTION 106 AGREEMENTS TO DELIVER AFFORDABLE HOUSING**

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## Forward

*Improving the use of S106 Agreements to Deliver Affordable Housing* was commissioned by housing enablers from the seven districts making up the Cambridge Housing Sub Region in June 2008, kindly funded by the Improvement East team at EERA.

The aim of the project was to improve districts' effectiveness and efficiency in leading and delivering services to all communities, by securing affordable housing on new development sites across our sub region. We wanted to be able to do this in fair, transparent and consistent ways, supported by a sub regionally agreed framework which builds on existing good practice. The specific emphasis of the project was to improve our legal agreements to deliver affordable housing (known as s106 agreements).

Through the project, the Cambridge Housing Sub Region wanted to promote measurable and sustained improvement in performance across our seven districts, and to enable all the other 47 districts across the region to benefit from this project and its outcomes. The project outcomes include

- A summary document which can act as a training tool for people wishing to understand the s106 process better, across the Region.
- A summary of learning from elsewhere across the UK, within the Region and within the sub-region on S106 affordable housing wording.
- A gap analysis of existing S106 agreement wording used by districts for affordable housing.
- A new proposed framework for a system to "pick and mix" clauses including cascade clauses.

The consultants, Ark, very quickly highlighted the need for a strong policy framework to support our affordable housing planning obligations. Some but not all districts needed this framework strengthened or reviewed, which generated some policy recommendations to unpin the suggested s106 clauses.

During course of project we experienced the increasing effects of economic downturn, and became keenly aware of the implications of new legal precedents, including Blyth Valley and Sheffield judgements. These prompted an urgent review of the systems needed to assess economic viability of individual sites and of district-wide affordable housing policies.

The project has helped equip housing enablers, legal teams and planners with greater confidence drafting s106 agreements, and provided a framework for negotiations with development partners. This is a well researched and practical resource from which we can select clauses suited to particular sites, and can work together to harmonise, but not homogenise, our planning policy frameworks around affordable housing.

I commend the project to you and look forward to seeing its application and further development in future.

Liz Bisset  
Chair, Cambridge sub-regional housing board (CRHB)

## 1. BACKGROUND

- 1.1 The Cambridge housing sub-region is experiencing significant growth in the provision of new homes and high levels of housing activity are forecast to continue for the next 10 to 15 years, subject to housing market conditions.
- 1.2 The sub-region is made up of seven districts in total, five of which are within the county of Cambridgeshire and two of which are actually located within Suffolk but have housing markets which are substantially influenced by the economic pull of Cambridge. The seven local authorities collaborate on housing market assessment and recognise the value of integrating policy responses to addressing demands or imbalance in the housing market.
- 1.3 Although Cambridge is a sizeable urban centre and one which has enjoyed considerable economic growth and prosperity in recent years, the remainder of the districts are predominantly rural and fairly diverse in character. Consequently, traditionally, the various district level local authorities have tended to develop policy and practice individually. Therefore there is a fair degree of variance in the planning policy framework across the sub-region including the timing of production of Local Development Framework documents and in the existence and character of supplementary planning documents/guidance on affordable housing. Section 3.2 of this report provides a matrix style breakdown of the status of relevant planning policy across the sub-region.
- 1.4 The various authorities recognise that a lot of good work has taken and is taking place on planning for affordable housing in the sub region. A considerable pool of experience has been built up over time on the deployment of Section 106 agreements to implement affordable housing planning policy but inevitably securing agreement with landowners and developers is often challenging and the negotiating process is protracted.
- 1.5 In recent years, obligations on landowners and developers to provide affordable housing in exchange for securing planning consents for larger market housing schemes has become the prime source of supply. Current housing market conditions are hampering the progress of schemes as forecasts for sales values and rates have been downgraded substantially and many landowners or developers have decided to delay the development of sites until conditions improve, or at least become clearer and more stable. This is of particular concern to many of the authorities in the Cambridge sub-region as there is high dependency for affordable housing supply on a very limited number of large projects. Aside from the obvious risks to supply, these sites can be expensive to develop, being contingent on substantial new infrastructure provision including extensive community facilities. So even if projects do proceed within reasonable timescales, project viability is being affected substantially by reduced expectations on sales values and sale rates. Therefore, the potential to generate anticipated affordable housing contributions and various other Section 106 contributions and to meet infrastructure costs may not allow realistic land values to be achieved (levels sufficient to induce the land coming forward for residential development) without higher than anticipated levels of public subsidy.

- 1.6 A Section 106 agreement is a planning obligations agreement entered into by a landowner or developer or ultimate property owner (or any combination of these) and a local planning authority. It secures legally gains accruing to the local community, which are sought through the operation of planning policy, for permitting new development to take place. These gains might be financial contributions for providing educational facilities or road or other transport improvements or other community buildings, might be public open space or play facilities or other recreational provision or might be affordable housing at prices and of types which meet the needs and circumstances of local people being included within the scheme.
- 1.7 The use of Section 106 agreements is governed by the Town & Country Planning Act 1990 as amended by the Planning and Compensation Act 1991. Circular 5/05 'Planning Obligations' provides specific guidance on the deployment of Section 106 Agreements as follows:
- Local authorities should seek to include as much information as possible in their published documents in the Local Development Framework.  
Local planning authorities are encouraged to use and publish standard heads of terms, agreements/undertakings or model clauses wherever possible in the interest of speed.*
- A Practice Guide on Planning Obligations was published by the Government in early 2006 to amplify the guidance offered in Circular 5/05.
- 1.8 In response to Circular 5/05 and as a result of experience arising from negotiations on agreements most local authorities now operate some standardisation in forms of Section 106 agreement, sometimes extending to publishing model clauses and/or a model agreement format.
- 1.9 Because of reliance on large scale market development sites for supply of affordable housing going forward, because of the diversity of policy and practice in the Cambridge sub-region and because of the need to pool the growing relevant experience of the various authorities, it was decided to commission a consultancy assignment to capture good practice and improve consistency. Section 2 of this report sets out the brief for the consultancy assignment and the methodology which was proposed and agreed.
- 1.10 The key output for the assignment is a series of model clauses for Section 106 agreements capable of forming part of detailed guidance to applicants. Because the assignment has achieved other findings which do not relate directly to Section 106 agreement content, there are a series of other recommendations in the report which should translate into other aspects of local planning policy.

## 2. BRIEF AND METHODOLOGY

- 2.1 The seven authorities which have joined forces to commission this assignment are doing so with the aim of securing affordable housing on new development sites in a fair, transparent and consistent way. The authorities wish to establish a framework for Section 106 agreements which builds on existing good practice. In addition, the consultancy assignment should improve understanding between the various professionals involved in negotiating Section 106 agreements of their respective roles and objectives and should culminate in the production of a training tool to raise and sustain awareness.
- 2.2 The authorities highlighted some very specific difficulties with which they are presented when negotiating on Section 106 agreements including:
- long lead in times which are exacerbated by a lack of clarity/precision on authorities' expectations,
  - a degree of uncertainty or difference on desired outcomes between different professionals involved in the process,
  - sites being offered to various Registered Social Landlords (RSLs) giving rise to inflationary pressures on the cost of affordable housing,
  - inconsistency of design and constructions standards.
- 2.3 In particular, the authorities asked that the appointed consultant reflect good practice recommendations, made in the East of England Regional Assembly (EERA) guide 'Delivery of Affordable Housing through Section 106 Agreements'. It was acknowledged that some authorities individually are already working on improving their forms of Section 106 agreements but there is a collective desire to knit together these threads of improvement to maximise the benefits for all.
- 2.4 Some specific areas for improvement in the provisions of Section 106 agreements were identified in the published brief and these included:
- 'cascade' clauses,
  - percentages of dwellings in different tenures,
  - affordability of intermediate home ownership and how this translates into equity stakes and rent,
  - reference to HCA quality standards,
  - distribution and mix of tenures across sites,
  - size and types of affordable housing dwellings,
  - encouraging involvement for preferred RSLs,
  - nomination and allocation arrangements,
  - mortgagee in possession clauses.

- 2.5 The proposed Section 106 clauses to be developed should offer a comprehensive framework for negotiation locally. Ideally, authorities should be able to select those clauses which are most appropriate to the particular circumstances of each scheme, described in the brief as a 'pick and mix' approach.
- 2.6 It was recognised in the brief that RSLs may want to become involved in the assignment and that this should be facilitated within its methodology.
- 2.7 In responding to the authorities' brief, Ark developed an assignment methodology consisting of a sequence of specific tasks. This became the agreed basis for conducting the assignment and is as follows:

| Stage | Stage Detail   | Time Scale    |
|-------|--|---------------|
| 1     | Information gathering and context summary – Source and evaluate existing strategies, policies and guidance.  | June/July     |
| 2     | Inception meeting – The Ark team meet with the Steering Group to: <ul style="list-style-type: none"> <li>• Confirm methodology and approach</li> <li>• Identify key contacts in the Housing Strategy and Planning Teams of each authority</li> <li>• Discuss relative success of existing policies,</li> <li>• Identify what are believed to be examples of best practice locally</li> <li>• Agree the programme and outcomes</li> </ul>   | Early July    |
| 3     | Conduct face to face semi structured interviews with key contacts (enablers, planners, including Growth Area planners and solicitors) of each authority. Understand the role of the team<br>What they believe they do well<br>What they know to be areas of weakness<br>Identify priorities<br>Identify 'deal breakers'<br>Build an understanding of grants provided by the HCA that support Section 106<br>The extent of current Section 106 redrafting being undertaken independently by LAs | July/Aug/Sept |
| 4     | Work with the lead RSL to identify a small but representative group of RSLs and hold a 'focus group' discussion to better understand their perspective, pressures and winning approaches.  | Sept          |
| 5     | As part of the "write up" to stages 3 and 4 provide a matrix of documents identifying good practice and weaknesses   | Sept          |
| 6     | Revisit existing national and regional advice and good practice.   | Aug/Sept      |

| Stage | Stage Detail   | Time Scale        |
|-------|--|-------------------|
| 7     | Ark team meet to evaluate progress, identify existing documents and clauses that provide a sound basis for progress, identify gaps and begin drafting new or improved documents.                                 | Sept              |
| 8     | Meet the steering group to review progress, report initial findings and to discuss the shape of the report.  | October 14        |
| 9     | Complete first draft of Section 106 documents and circulate together with advice relating to other documents that need improving in order to provide the 'weight' required to support the 'clauses'.             | October           |
| 10    | Meet the Steering Group to discuss the draft document, identify areas which need improving, successful clauses and gaps.   | November          |
| 11    | Meet with a representative group of housing developers to describe the project and the outcomes – receive initial and possibly written feedback and provide an overview of their comments to the steering group. | October/Early Nov |
| 12    | Draft training guide.  | November          |
| 13    | Complete all drafting and circulate to the Steering Group.   | December          |
| 13    | Provide final report and wording to CHRB.  | Jan/Feb 2009      |
| 14    | Provide a training session and launch the training guide to relevant staff (housing strategy & enabling, planning and solicitors) from the 7 Cambridge Sub Region authorities                                    | Jan/Feb 2009      |
| 15    | Assist in the delivery of a regional conference in order to disseminate learning and good practice to the wider region   | Jan/Feb 2009      |

2.8 This second draft report is intended to be close to the final published version which will be the key output of the assignment. The report has been amended and developed to include feedback from the various authorities and to accommodate additional research findings. It has been agreed with the authorities that:

- discussions with developers should be delayed until this version of the report was produced,
- a suitably experienced lawyer should be appointed jointly by all of the authorities to comment on and refine the model Section 106 clauses included in Section 8 to enhance their applicability.

### 3. THE POLICY AND MARKET CONTEXT

#### 3.1 Sub-Regional Planning Policy and Housing Strategy

- 3.1.1 Cambridgeshire is one of the fastest growing counties in the UK. It is expected that the population of the County will have grown to 665,000 by 2021. The sub-region influenced by the City of Cambridge is larger than the county alone and incorporates two Suffolk districts bordering Cambridgeshire. The sub-regional population is expected to have grown from 706,000 in 2001 to 840,000 by 2021, virtually a 20% growth. Three quarters of this growth will occur as a result of in-migration.
- 3.1.2 The economy of the sub-region is driving growth, particularly the high technology industries located in the City of Cambridge and in South Cambridgeshire. However there are significant disparities especially affecting the north of Cambridgeshire where its agriculture and port activities have declined.
- 3.1.3 Whilst transport infrastructure is poorly developed in the sub-region, there is less commuting for work between districts in the sub-region than might be expected, given the City of Cambridge's economic dominance. Nonetheless, a significant aim within both the Regional Economic Strategy and the Regional Spatial Strategy is to reduce the need to commute to work, hence the emphasis for new building in the City of Cambridge and South Cambridgeshire where employment opportunities are concentrated.
- 3.1.4 Regional planning policy envisaged a total of around 90,000 new homes being provided in the sub-region between 2001 and 2021. There remains around 70,000 still to be provided and over 40% of these are expected to be contributed by larger strategic sites. The expectation is that, across the region as a whole, some 35% of housing completions will be affordable over the RSS plan period.
- 3.1.5 In May 2008, a report was published as the culmination of a Strategic Housing Market Assessment (SHMA) for the Cambridgeshire sub-region. This has helped to define the local housing market, gauge affordability issues and estimate the degree of need and demand likely to be generated for affordable housing during the plan period. The SHMA used 2006 data and highlighted some of the regional disparities mentioned previously. For example, the City of Cambridge had house prices which were 135% of the sub-regional average whereas prices in Fenland District were 73% of the average. There were also average earnings disparities and the range of ratios of average house prices to average household earnings were:

|                      |      |
|----------------------|------|
| City of Cambridge    | 7.75 |
| East Cambridgeshire  | 6.11 |
| Fenland              | 5.90 |
| Huntingdonshire      | 6.15 |
| South Cambridgeshire | 6.75 |
| Forest Heath         | 6.69 |
| St. Edmundsbury      | 6.91 |

Affordability ratios worsened when lower quartile house prices were contrasted with lower quartile earnings. The ratio for the City of Cambridge jumped to 8.8 and for Fenland to 6.52.

3.1.6 Recent housing market dynamics are likely to have improved the affordability ratios. Whilst house prices continued to rise into 2007, they have since fallen back and, whilst difficult to estimate accurately, will have dropped some 10-15% from peak. Therefore, prices will have returned close to their early 2006 levels used to inform the SHMA whilst earnings will have increased by around 6.5% over that period. Whilst this may notionally have improved the affordability of market housing, by the ratio measure at least, the inaccessibility of mortgage finance on terms comparable to 2006 means that affordability gaps for first time buyers are effectively as bad if not worse than ever.

3.1.7 Key findings emerging from the SHMA which are influencing planning for affordable housing provision include:

- demand for intermediate home ownership is concentrated in the City of Cambridge, South Cambridgeshire, Huntingdonshire and St. Edmundsbury and has tended to be expressed mainly for smaller homes (coming mainly from single person households and childless couples),
- half of all applicants for intermediate home ownership could only support a mortgage of £68,000 or less,
- average incomes required to support the purchase of Newbuild Homebuy were higher in most districts than incomes needed to secure lower quartile market renting. Only in the City of Cambridge and in Huntingdonshire was the position reversed. This presents a problem in planning policy terms as PPS3 defines the upper limit for the intermediate housing market as the entry point at which households can afford market renting. There is planning case law to reinforce this for example South Gloucestershire v Bovis Homes ref: PT033142/0,
- the annual need for new affordable homes across the 5 Cambridgeshire districts is 5,574. Based on committed new supply in 2006, only 958 of this annual target could be identified as due to come on stream, leaving an annual shortfall of 4,616,
- if the need for new affordable homes is presented as a proportion of the new housing planned overall within the RSS then the following picture emerges:

|   | City   | East Cambs | Fenland | Hunts  | South Cambs |
|---|--------|------------|---------|--------|-------------|
| Need for new affordable homes projected over 2006 to 2021 (excluding commitments) | 10,865 | 6,945      | 4,405   | 11,365 | 12,470      |
| Draft RSS target for all homes 2006 to 2021                                       | 16,700 | 5,360      | 7,760   | 8,310  | 19,980      |
| % affordable represents of target   | 65%    | 130%       | 57%     | 137%   | 62%         |

- the proposed tenure split between social renting and intermediate tenures, updated to March 2008, for the 5 Cambridgeshire districts is:

|                       | Social Rent | Intermediate |
|-----------------------|-------------|--------------|
| The City of Cambridge | 82%         | 18%          |
| East Cambridgeshire   | 70%         | 30%          |
| Fenland               | 84%         | 16%          |
| Huntingdonshire       | 71%         | 29%          |
| South Cambridgeshire  | 71%         | 29%          |
| Overall balance       | 78%         | 22%          |

## 3.2 Status of Local Planning Policy

- 3.2.1 There is, not surprisingly, considerable variation in the nature and depth of local planning policy for affordable housing provision across the sub-region. Some local planning authorities have saved adopted Local Plan policies for affordable housing whereas others have adopted or advanced core strategies within Local Development Frameworks which now govern affordable housing provision. Only three of the seven authorities appear to have produced supplementary planning documents to describe in greater detail how their affordable housing planning policies will be applied. The following table provides a quick reference guide to the status of relevant planning policy across the seven authorities:

|                       | <b>LDF or<br/>Local Plan Policy</b>  | <b>SPD or<br/>SPG</b>  | <b>Other<br/>Guidance</b>  |
|-----------------------|--|--|--|
| The City of Cambridge | Adopted policy in Local Plan (2006). Policy 5/5 sets a 40% quota on sites of 0.5 hectares or 15 units or more. Agreed mix required.  | Adopted on 14/1/08. Refers to Strategic AHP for large strategic sites. Owner or developer to demonstrate viability problems.   | Strategy and advice note on planning obligations inc. contribution levels. |
| East Cambridgeshire   | Local Plan 2000 still has saved policies. LDF is being revised and SPDs are expected to be updated in 2009 although there is unlikely to be one for affordable housing. Policy to be contained in the Core Strategy. | At present there are no specific plans for an up-to-date SPD on affordable housing. There is apparently an earlier SPG on affordable housing which Ark has not seen. | None identified.   |
| Fenland               | Policy H14 gives weight to the SHMA/HNA and underpins 35% quota. New Core Strategy at preferred options stage – thresholds will reduce.  | Proposed within the LDS but debates with GO East have delayed material progress on drafting.   | Aiming to develop a viability assessment methodology.                      |
| Huntingdonshire       | Secured Local Plan policies adopted in 2002 – 29% quota still applies to areas outside Cambs. Sub-region.  | Adopted in November 2007 – assumes grant investment to deliver 40% quota on sites 0.5 hectares or 15 units or more.  | None identified.   |

|                      | <b>LDF or Local Plan Policy</b>  | <b>SPD or SPG</b>   | <b>Other Guidance</b>  |
|----------------------|--|---|--|
| South Cambridgeshire | LDF Core Strategy adopted in July 2007.  | Draft SPD – 40% quota on site unless viability problems can be demonstrated.              | None identified.   |
| Forest Heath         | Core Strategy due for consultation in Spring 2009 – adoption expected in June 2010 – aiming for 35% RSS quota. | Suffolk wide SPG on planning obligations guiding the approach to negotiating obligations. | None identified.   |
| St. Edmundsbury      | Seeking an extension to saved Local Plan policies – Now aiming for 35% RSS quota.                              |   | Intending to produce draft guidance in January 2009 but not SPD. |

3.2.2 In the course of conducting this assignment Ark has been able to obtain sample Section 106 agreements deployed in the Cambridge sub-region, as follows:

- City of Cambridge Council - Sample Section 106 clauses complete with comments on what has and has not worked effectively.
- South Cambridgeshire D.C. - Sample Section 106 agreement.
- Fenland District Council - Sample Section 106 agreement.
- Huntingdonshire D.C. - Two actual agreements entered into in 2005 and 2006 together with three sample or draft agreements.
- St. Edmundsbury D.C. - A draft Section 106 agreed for a specific scheme.

3.2.3 The City of Cambridge document is closest in style and content to other good practice forms studied by Ark but lacks any substantive content without a schedule to address the specific affordable housing provisions related to an actual scheme proposal. The Fenland D.C. and Huntingdonshire forms of agreement are precise and deal

effectively with a range of essential characteristics associated with the affordable housing provision including references to standards and mortgagee in possession issues. Neither is particularly comprehensive on affordable housing provisions. Neither the South Cambridgeshire nor the St. Edmundsbury agreements provide a typical level of detail in connection with the provision of affordable housing.

- 3.2.4 The South Cambridgeshire agreement does include one clause which is unusual and interesting insofar as it expects rent charged on a landlord's retained interest in a shared ownership dwelling not to exceed the relevant proportion of 'an affordable rent'. The 'affordable rent' means The HCA's target rent. Rents at the traditional Newbuild Homebuy guide level of 2.75% of the value of retained equity will often be higher than the appropriate percentage of target rent in a high value area. Ark is supportive of South Cambridgeshire's attempt to set a reasonable affordability cap on rents on shared ownership but we would advocate that it is best to test the affordability of the total housing outgoings on shared ownership (and other intermediate tenures) and require this not to exceed 25% of gross household earnings for the target market (as per PPS3 recommendations).
- 3.2.5 One of the difficulties presented for the assignment being undertaken by Ark is that recommendations we make on improving and standardising policy, process and Section 106 affordable housing clauses can only be implemented across the sub-region within the context of established planning policy. For some authorities which have recently adopted or advanced drafts of supplementary planning documents, any change of requirement or emphasis in policy may have to await redrafting and adoption of a revised SPD in due course. This could be up to 3 years in the future. Nevertheless it should be possible for supporting guidance to be produced which begins to implement any appropriate changes, albeit this will not have the force of a statutory plan. For example, Bath and North East Somerset Council publishes a 'planning companion' to amplify some of its affordable housing planning obligations and ensure detailed expectations are always current.
- 3.2.6 For those authorities which have a very limited policy framework relating to affordable housing planning obligations, whilst there is a good deal of 'catching up' to do, the policy vacuum lends itself to comprehensive new supplementary planning documents being produced which adopt current thinking and good practice guidance.
- 3.2.7 There appears to be a fair degree of policy convergence already taking place between the sub-regional authorities in relation to planning for affordable housing. Mainly stimulated by the SHMA, the Cambridgeshire authorities are developing their targets towards 40%. The two Suffolk authorities are moving to 35%. There is close integration here although it does give rise to some issues on testing viability which are discussed later in the report at Section 6.2 and elsewhere.
- 3.2.8 As a 'next step' for the various authorities within the sub-region, once an agreed collective position is achieved on which Ark recommendations should be adopted in policy and practice, it will be important to formulate a convergence plan which is sensitive to the timing and status of each authority's Local Development Scheme (the timetable for production of LDF documents in that locality).

## **4. AFFORDABLE HOUSING PLANNING PRACTICE IN THE SUB REGION**

### **4.1 Outcomes from Interviews with Local Authority and Cambridgeshire Horizon's Personnel**

4.1.1 In order to better understand the local arrangements for the delivery of Section106 schemes, Ark arranged to interview teams from the seven authorities plus representatives from Cambridgeshire Horizons. Interviews were conducted over the period between 6 – 14 October. We were keen to meet with personnel from the three key teams, Housing Strategy/Enabling, Planning and Legal, and most authorities were able to field representatives from all three. The interviews were conducted as semi structured face to face meetings in the authorities' offices. A copy of the interview form is included as Appendix A.

#### **4.1.2 Context**

4.1.2.1 All authorities with the exception of Fenland have noted a significant downturn in the volume of planning activity with lower numbers of sites at the pre submission stage as well as fewer sites in the formal planning system. It is clear that the sub region can expect volumes of applications to increase in line with any general housing market improvement.

4.1.2.2 The acknowledged difficulty is in planning for an upturn in the housing market whilst experiencing a significant downturn. Around half of the authorities are experiencing requests to revisit and reduce Section106 affordable housing requirements stated in existing agreements.

#### **4.1.3 Emerging and identified best practice locally**

4.1.3.1 The following points have been noted as good practice locally and recognised as requiring some amendment to existing procedures to implement effectively:

- Enablers as consultees - In two of the authorities enablers have the same consultation status as Highways and Environment departments, this ensures that the enablers are clearly bolted into the planning approvals process.
- Affordable housing briefs prepared by enablers are seen as best practice. These seem less worthwhile for smaller sites but of genuine value for larger developments and Ark recommends that the approach be implemented for sites over 30 homes. These briefs are not necessarily part of formal planning briefs.
- Formal notification processes - Most authorities have no formal process for notifying local RSLs regarding planning applications being made and the authorities' expectations and requirements. We feel that this is an important step in the process. Whilst there is little evidence of

developers “playing off” the RSL offers against the authorities there is the probability that RSLs when pricing developer offers have a limited understanding of what an authority actually requires. This is borne out in some of the RSL comments made in Sections 5.3 and 5.6. We therefore suggest that an alert mechanism be considered between the authorities and RSLs. We acknowledge that alerting specific RSLs cannot guarantee the involvement of one or more of them in the scheme.

- Affordable housing SPDs - The formulation of SPDs, that fully articulate the affordable housing requirements, is regarded as an important element in the planning document matrix. It is seen as beneficial by planners and enablers alike.
- Affordable housing definitions - It was noted that not all authorities fully adopt the definitions from PPS3. The definition of affordable housing in line with PPS3 is strongly recommended.

4.1.3.2 The following points have emerged as good practice and are viewed as straightforward to implement.

- the greater the clarity with regard to overall contributions the more likely it is that targets will be achieved and the more consistent authorities are in this view the better. For instance, in the City of Cambridge there is real clarity – affordable housing is the priority and 40% the expectation of councillors, planners, enablers and solicitors,
- most authorities have had some experience of working with a Section 106 agreement first drafted by a developer. We feel that all Section 106 agreements should emanate from the relevant local authorities themselves.

#### 4.1.4 **Emerging issues and potential best practice solutions**

4.1.4.1 Reporting to the development control committee – There is a mix of approaches to reporting affordable housing requirements to development control committees with around 50% of authorities reporting in significant detail and others supplying only outline information. The argument for including outline headings is that this leaves officers free to conclude the detail of the requirement by negotiation. The counter argument is that the affordable housing requirement should be discussed in some detail prior to or during the application process with committees being given full details for approval.

4.1.4.2 On balance our view is that the development control committees should be given as much detail as possible to approve. Suggested report headings include:

- Total quantum of homes in affordable tenures
- Total number of homes and the number which are affordable
- Tenure split between rent/intermediate by percentage

- Tenure split by number of homes
- Property types to be provided (number of bedrooms by houses flats/ bungalows)
- Property types by tenure split
- Grant requirement (if any)
- Review provisions (if any)

4.1.4.3 Delivering schemes that meet policy positions – We discussed the degree to which authorities were prepared to depart from policy positions. Most agreed that they have done so already or are prepared to do so and stated that changes tended to be variations in tenure rather than in reductions to the overall affordable housing percentage achieved. It is also clear that authorities are varying the outcomes depending on whether or not, and to the degree to which, Social Housing Grant funding is made available.

4.1.4.4 We understand that five authorities are routinely receiving grant funding that is supporting the achievement of policy positions rather than delivering homes additional to the policy target or any other enhancements (larger family homes, homes for supported housing etc).

4.1.4.5 Certainly, it would be desirable for the criteria and framework for requiring public subsidy to be harmonised. There is a risk to those authorities using grant to support policy that the grant will not be secured and that they will then undershoot the policy position.

4.1.4.6 The points above are made in recognition of the differing scheme economics applying across the sub-region and of course from one scheme to another. So whilst the need for grant and appropriate levels will always vary, there is scope to harmonise the framework across the sub-region.

4.1.4.7 Without grant support there may be economic arguments for moving away from the stated policy position and these arguments are very closely linked to the viability assessment issues addressed later in this report. There is a clear view that viability assessments will have a greater role going forward. Experience to date is that developers generally have accepted the targets and have not entered negotiations or brought viability into the equation. This situation has now changed and all but one authority has reported recent negotiations with developers regarding viability.

4.1.4.8 Experience of using viability assessments is mixed with authorities still developing greater expertise in this field. Two authorities let developers provide a model which is scrutinised on an “open book” basis by Internal or external quantity surveyors and/or valuers. Four authorities have experience of using proprietary approaches (2 have used Grimley, 1 King Sturge and 1 Three Dragons models).

- 4.1.4.9 We see a clear requirement for the authorities to build expertise in this area. We foresee many more economic arguments being used during this downturn to reduce affordable housing requirements, and a clear advantage to their continued use by developers during an eventual upturn. There would be benefits in the use of a consistent approach across the sub region: it would enable expertise to be shared between authorities possibly on a formal shared resource basis. By building expertise more widely, the viability assessment process will be more resilient in discussions with developers and more resilient to staff changes within authorities. The template approach will have additional benefits in making a case for additional grant to fund enhancements or in proving that the policy position requires greater subsidy than has been necessary in the past.
- 4.1.4.10 Work would need to be undertaken to confirm the assumptions that underpin approvals and these assumptions could and in reality would have to be varied for each authority. However if the overarching approach to templates is the same these variations can easily be understood by users.
- 4.1.4.11 The interviews highlighted an emerging issue regarding the affordability of Homebuy products. Across the sub region there are issues of affordability particularly in the rural districts where low agricultural wages are driving low average incomes. Two authorities have no set approach, two use a definition in agreement with the Homebuy Zone agent and others use local agreements with RSLs or out of date figures. One authority uses the “national scheme”.
- 4.1.4.12 In discussion authorities pointed to the difficulties of maintaining standard approaches to affordability during times of rapidly increasing house prices or decreasing incomes as barriers to utilising a standard approach. It is our contention that such barriers can be overcome using a series of simple indices linked to the PPS3 and SHMA guidance. We feel that there would be real advantages in using a harmonised approach and that such an approach would tie into the assumptions used to underpin a standard viability assessment.
- 4.1.4.13 A number of authorities raised the issue of performance monitoring the outturn schemes to ensure that they meet the standards set in the Section 106 agreement. One approach to confirming outturns would be to use the formal RSL notification process outlined in section 4.1.3.1 as part of the monitoring process. If it is clear which RSLs are receiving the homes and they understand the targets then getting the outturn reported becomes part of the engagement process and could be easily implemented.
- 4.1.4.14 We understand that Cambridgeshire Horizons has a monitoring officer in the planning team and that St Edmundsbury is currently recruiting to a similar role. Once again a sub regional approach may prove to be practical.

## 4.2 Regional Good Practice Guidance

- 4.2.1 In April 2008, the East of England Regional Assembly, with support from the East of England Development Agency, launched a good practice guide *Delivery of Affordable Housing through Section 106 Agreements*. The report was authored by the Cambridge Centre for Housing and Planning Research and Three Dragons. This guide seeks to offer ‘a compendium of good practice in the application of Section 106 Agreements to affordable housing’. In a sense, the Ark assignment is a natural extension to this work, developing guidance on the form of Section 106 agreement to a more detailed level.
- 4.2.2 The guidance in the report places emphasis on the need for clear policies backed by robust financial viability testing. Early dialogue with the Homes and Communities Agency on the availability of grant is recommended and it is further suggested that SPDs or local housing strategies should offer guidance on the availability of grant. We can see from the evidence we have gathered on this assignment that there is an expectation typically in the Cambridge sub-region that most affordable housing planning obligations will benefit from grant investment. Whilst traditionally Homes and Communities Agency policy has expected that grant will only be forthcoming if real ‘additionality’ can be secured, if residential development economics in an area (Fenland district being a good example) suggest that policy levels of affordable housing provision render a high proportion of schemes uneconomic, then it would be reasonable to argue that achieving the policy target means gaining ‘additional’ dwellings over that which could be supported from within a scheme’s own cross-subsidy potential. Notwithstanding this point, it is still important for establishing a reliable test of viability that a grant free level of affordable housing contribution is established. This is acknowledged in ATLAS’s research report on cascade agreements (see Section 6.2 of this report).
- 4.2.3 On a related point, another recommendation within *Delivery of Affordable Housing through Section 106 Agreements* is that affordable housing targets within policy should be set so as to be financially achievable. Given recent downward movements in house prices and general development economics within the Cambridge sub-region, an affordable housing target of 40%, or even 30%, would not enable schemes to produce adequate returns to developers, or land values sufficient to induce the development of sites for housing, without the benefit of some public subsidy. There is a need to consider the implications of affordable housing policy on the economic viability of housing development in an area and relate this to the anticipated availability of funding including, when relevant, grant funding. This expectation of PPS3 has been clarified by a recent Court of Appeal case involving Blyth Valley Borough Council and its implications are described in Section 6.2 of this report.
- 4.2.4 Whilst it is important for an affordable housing planning policy to have been developed with the benefit of generalised viability assessment work, including examining the availability of public subsidy where appropriate, the application of policy to specific schemes must be supported by testing of the real economic dimensions of that project if a departure from policy is to be permitted.

- 4.2.5 *Delivery of Affordable Housing Through Section 106 Agreements* does highlight the importance of 'cascade' mechanisms in Section 106 Agreements to help resolve uncertainty on long term larger sites. Provision for review of such cascade mechanisms is also recommended, to take account of variations in grant funding and changes in house prices and development costs. The report also recognises that the Government's proposed Community Infrastructure Levy (CIL) could have implications for the delivery of affordable housing.
- 4.2.6 In providing guidance on an effective negotiating process the guide suggests the use of standard Section106 clauses or agreements as a useful starting point in discussions with developers. It is also emphasised that guidance should include the stage a Section106 agreement ought to have reached before a planning application goes before a committee. The guidance concludes by listing a series of indicators which should be monitored on Section106 Agreements for affordable housing to test outturn performance by developers. It is recommended that local authority members receive reports on these indicators and that there is a dedicated officer with responsibility for monitoring achievement of agreed expectations.

## **5. EXPERIENCES AND VIEWS OF AFFORDABLE HOUSING PROVIDERS**

### **5.1 Results of Focus Group with RSLs**

- 5.1.1 As part of the agreed methodology of this assignment, Ark arranged a focus group meeting with representatives from RSLs operating within the Cambridge Sub Region in order to gain a better understanding of the experiences and views of affordable housing providers.
- 5.1.2 At the assignment inception meeting held on 22 July 2008, the Steering Group advised that Cambridge Housing Society had agreed to co-ordinate the RSL input. The CEO of Cambridge Housing Society, Nigel Howlett, proposed a list of RSLs to attend the meeting. The meeting took place on the 6 October 2008 at the Luminus offices in Huntingdon. Disappointingly, only 7 of the 14 invitees attended the meeting, but notwithstanding this, we were able to obtain some excellent feedback from those who did attend.
- 5.1.3 The meeting comprised a presentation by Ark to the RSLs highlighting the background to the assignment, and set out the methodology and milestone dates to complete it for early 2009. The presentation went on to highlight the key objectives of the assignment, one of which was to review and improve the wording of Section 106 agreements. To this end, Ark set out 10 key questions for the RSLs to debate collectively as part of a break out session and an overview of the feedback forms the remainder of this section of our report.

### **5.2 Responsiveness of the RSLs**

- 5.2.1 The RSLs at the focus group responded very positively in giving their views and experiences on the subject of Section 106s. All attendees were interested in contributing to a successful outcome for the project, and the feeling was that the outcome would benefit and streamline the provision of affordable housing within the region for all involved.

### **5.3 A Successful Section 106 Scheme**

- 5.3.1 All RSLs agreed on the responses to a question on what made for a successful Section 106 scheme. There was particular unity with RSLs needing the local authorities to have a consistent approach, and to have more detail and clarity in respect of the tenure mix within the Section 106 as early as possible. It was felt that a lot of quality time has been wasted previously without clear communication early on in the process. It was also acknowledged that quite often information to the authority will be sketchy in the early days, but a common goal by all to have more detail earlier would help with the financial appraisal of the scheme and lead to a smoother delivery.

### **5.4 An Unsuccessful Section 106 Scheme**

- 5.4.1 There was a general feeling that RSLs are becoming too exposed to market sales, and this extends to other tenures perceived as risky, such as shared ownership units required within a Section 106. This concern is exacerbated by the current

downturn in the housing market and the global financial crisis currently restricting mortgage approvals. This concern, linked to the uncertainty of Social Housing Grant levels and availability of grant, causes problems when assessing the commercial viability of a scheme. One further problem highlighted was that developers regularly increase prices of affordable units and change their build programmes to suit market demands, which in turn creates relationship problems with the Homes and Communities Agency when grant take up and dwelling mix forecasts are not met.

## **5.5 The Scheme, the Tenure and the Product Mix**

- 5.5.1 All RSLs were in agreement that the main factor affecting the percentage of affordable units and the type of product on a scheme is its location.
- 5.5.2 The average proportion of affordable units on a site in the sub region is around 30%, and the average tenure split of these affordable units was 70 % Rent and 30% 'Shared Ownership.' Typical variations to this are circa 5% market sale units and circa 5% intermediate rent.
- 5.5.3 RSLs were in full agreement that there was capacity to include more supported housing within Section 106 schemes.
- 5.5.4 One and two bedroom apartments were still deemed popular within Cambridge City Centre, however there was strong resistance to apartments outside the city centre, particularly in the more rural areas.
- 5.5.5 Two and three bedroom houses were preferred outside the city, and 4/5 bedroom family housing would also be considered.

## **5.6 Relationships with Developers**

- 5.6.1 Some RSLs were more vocal than others about their relationships with developers. The RSLs categorised developers into 2 groups: Local and National.
- 5.6.2 Generally speaking, RSLs enjoyed a good working relationship with the local developers. Typically, these organisations were smaller, friendlier and more flexible in delivering the affordable housing schemes than their national counterparts.
- 5.6.3 In contrast, RSLs had poorer working relations with the larger national developers who tended to be less personal and less flexible to the local housing needs.
- 5.6.4 RSLs would like to be involved in Section 106 schemes at an earlier stage, where they can actually use their knowledge and expertise to add value to the scheme. It was felt that RSLs tended to be included in discussions too late.
- 5.6.5 A separate meeting is to be arranged with developers later in this assignment. A selection of local and national developers will be invited to comment on the drafts of the model Section 106 clause and other recommended policy developments, and this is expected to occur in February 2009.

## **5.7 The Homes and Communities Agency (HCA)**

- 5.7.1 The HCA's regional office has 3 to 4 large partner RSLs with whom it has a particularly strong relationship. The remaining RSLs did enjoy a good relationship, but were consulted less often on affordable housing matters within the region.
- 5.7.2 It was felt that the processing of grant claims by the HCA was generally slow, and there was a very rigid approach to these claims. This is consistent with many other regional offices. The RSLs had mixed views about the levels of future grants, with some anticipating a rise in the short term.
- 5.7.3 All the RSLs felt that the economics for affordable housing in the region was generally sound. Demand exceeded supply, and more housing was required to meet that demand. The risk of reducing HCA grants was considered a real threat to the affordability of future housing.
- 5.7.4 On the subject of 'additionality', the RSLs were reluctant to give any views. This was disappointing and this topic area may be better discussed on an individual basis.
- 5.7.5 RSLs gave a positive response to the inclusion of cascade provisions within Section 106 agreements, particularly when the provision of affordable housing was linked to grant levels.

## **6. NATIONAL GOOD PRACTICE GUIDANCE AND EXEMPLARS**

### **6.1 Planning Obligations: Practice Guidance – DCLG July 2006**

6.1.1 This is the most important guidance available from Government on seeking and applying planning obligations. The guidance was produced to supplement Circular 05/2005, produced by the then Office of the Deputy Prime Minister, which is the governing instrument for the operation of planning obligations under Section 106 of the Town and County Planning Act 1990 (as amended). The guidance restates the expectation in PPS3 that for affordable housing 'there is a presumption that such housing should be provided as part of the proposed development of the site'. So, off site or cash contributions should only really be sought by exception and the relevant circumstances ought to be explained within the Local Development Framework (typically in an SPD).

6.1.2 Local planning authorities are advised to make available sufficient information on their planning obligation policies to enable applicants to understand the type and level of planning obligations sought from them. As well as process and resourcing advice the guidance suggests that it is desirable for authorities to employ a dedicated Section 106 planning officer.

6.1.3 Circular 5/05 encourages local planning authorities to produce standard heads of terms or agreements or model clauses in the interests of efficiency and clarity. The guidance document advocates standardisation of Section 106 provisions and for these to be included in the LDF so that they can be subject to formal consultation. As mentioned earlier in Section 3.2 of this report, the various authorities in the Cambridge sub-region have very different policy frameworks for articulating their affordable housing planning obligation policies and these are at different stages of evolution. Therefore, it will be more difficult for some authorities than for others to promote updated or new Section 106 model heads of terms/agreements/clauses via a statutory planning document.

6.1.4 The guidance refers to the DCLG/Law Society model form of Section 106 agreement. Whilst this is readily accessible via the CLG website and can offer a helpful 'starter for ten' its provisions in relation to affordable housing obligations are skimpy and dated and offer little of practical help to the Cambridge sub-regional authorities.

6.1.5 The guidance does emphasise that a local planning authority should keep its standardised documentation on planning obligations under review and update them as and when appropriate to keep pace with changing policy and circumstances.

### **6.2 Court of Appeal Judgement. Blyth Valley Borough Council and Persimmon Homes, Barratt Homes and Millhouse Developments Ltd – July 2008**

6.2.1 This recent judgement has significant implications for the development of robust and defensible affordable housing planning policy. The background is that Blyth Valley Borough Council developed an affordable housing planning policy, policy H4, within

its emerging Core Strategy which required that, “at least 30% affordable housing will be provided as a proportion of all new housing development in the Borough”. The policy was expected to apply to all developments over 10 dwellings in size. The target for affordable housing provision reflected a housing needs study, which was dated 2004 and actually recommended a 40% target. The target was lowered to be consistent with a neighbouring district, Wansbeck, with which Blyth Valley forms a single housing market. The developers have sizeable land interests in the Council’s area and have consistently contested the emerging affordable housing policy.

- 6.2.2 Development of the Council’s Core Strategy began prior to publication of PPS3 (albeit PPS3 had been in consultation draft form for some while) which requires that the overall target for the amount of affordable housing to be provided ‘should also reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing’.
- 6.2.3 The Council’s draft Core Strategy became the subject of independent examination by a planning inspector in February 2007, only 2½ months after publication of PPS3. The Council submitted a PPS3 compliance statement to the planning inspector making no mention of the fact that it had not subjected its affordable housing target to an informed assessment of economic viability and only that it reflected an ‘up to date assessment of needs’. The developers objected to policy H4 claiming that it was ‘not derived from a robust credible evidence base’. This phrase relates to a definition for testing whether a statutory plan is sound which was set out in PPS12 published in 2004. The developer was able to point to planning inquiry and appeal decisions in the area which questioned whether 30% affordable housing would permit viable schemes.
- 6.2.4 The inspector found that the Council’s policy was consistent with a neighbouring authority within the same housing market area and that it was acceptable as a borough-wide target. If material considerations on individual applications suggested 30% was not achievable then these could be considered on their merits and a lower percentage applied.
- 6.2.5 The developers sought judicial review in the High Court to overturn the inspector’s decision. The court found that the target must not be flawed by any deficiency in the process of arriving at it and that the Council had not met the PPS3 test of basing its target on an assessment of its economic viability. The judge quashed policy H4. That decision was challenged in the Court of Appeal by the Council.
- 6.2.6 The Court of Appeal dismissed the appeal by the Council and permitted the High Court decision to quash policy H4 to stand. The Court found that an informed assessment of the viability of a policy target is ‘not peripheral, optional or cosmetic. It is patently a crucial requirement of the policy’. Its absence meant that there was not a robust and credible evidence base and that therefore the policy was unsound.

- 6.2.7 The key question for the Cambridge sub-regional authorities is the extent to which the adopted and emerging policy target of 40% affordable housing, to be applied consistently across the sub-region, is sound unless subject to a generalised assessment of its impact on the economic viability of residential development sites. As we have pointed out, there are significant variances in house prices, earnings and affordability ratios across the sub region (see Section 3.1) and therefore, by definition, development economics. There is a greater likelihood that schemes will be reliant on public subsidy in order to meet 40% targets in some local authority areas more so than in others. Nonetheless, of course, individual sites and schemes always have their unique constraints, attributes and potential and it is impossible to generalise satisfactorily about scheme economics across a local authority area just as it is across the sub-region as a whole.
- 6.2.8 Paragraph 29 in the Section of PPS3 dealing specifically with affordable housing is clear that an assessment of the likely economic viability of land for housing within an area should take account of the likely levels of finance available for affordable housing. So, if an authority has a reasonable expectation that Social Housing Grant will be available for affordable housing development on Section 106 schemes, at levels which will enable a target of 40% affordable housing to be achievable in many circumstances whilst permitting schemes to secure sensible economic outturns for developers and landowners, then such an affordable housing policy should be regarded as sound.
- 6.2.9 It will be very important for an authority's policy framework to permit the testing of economic viability on a scheme/application specific basis because this is the only way in which an affordable housing policy can properly respond to the differing characteristics of each scheme. Nonetheless, in the light of the Blyth Valley appeal decision, it is essential that some more generalised testing is undertaken of the impact of a policy target for affordable housing provision, by reference to major allocated sites or hypothetical schemes displaying typical local cost and value characteristics perhaps by market 'zones'. Such a generalised assessment should be linked to reviewing the availability of grant in the area historically and The Homes and Communities Agency's plans and policy in relation to grant availability going forward.
- 6.2.10 In areas where meeting the affordable housing target appears to be fairly dependent on grant investment, Ark's later recommendations on the operation of cascade provision and future proofing reviews should establish clearly the grant free baseline for affordable housing provision on any individual scheme and also reassure both local authorities and developers that there is scope to flex provision to take account of unforeseen changes on long term projects.

### **6.3 Cascades: Improving Certainty in the Delivery of Affordable Housing for Large Scale Developments – Atlas 2007**

- 6.3.1 This research report was published by ATLAS, the HCA's 'Advisory Team for Large Scale Applications'. The team set out to consider to what extent the use of mechanisms such as cascades would assist in improving the delivery of affordable housing via planning obligations. The research noted that many local planning authorities only resorted to the cascade approach for larger, more complex

schemes. Whilst it acknowledged that cascades mainly provide a framework for agreeing or adjusting the quantum or mix of tenures dependent on funding availability, it also noted the potential for cascades to address changed housing need and market circumstances during an extended delivery period.

- 6.3.2 The report does recognise very clearly that an ‘economic viability assessment must clearly identify what can be provided without grant, to form the baseline position’.
- 6.3.3 In advocating a particular approach to the process of developing cascade mechanisms the report advocates the establishment of a Task Group prior to initial viability testing and this should include The Housing Corporation (now the Homes and Communities Agency) as well as the local authority and developer/applicant. It also proposes that heads of terms should be completed and agreed prior to the application stage.
- 6.3.4 The report suggests that ‘local authorities should be able to robustly justify rejecting any particular (affordable housing provider)’. This pre-supposes that the local authority can directly influence the selection by the developer of the AHP and at Ark we do not believe this to be an enforceable position. However, we also feel that if an AHP is selected which manifestly could not meet housing management standards annexed to the Section 106 Agreement then a local planning authority could refuse to sign an agreement or, if selection takes place post agreement, could claim that a developer was in breach of the agreement.
- 6.3.5 The report recommends that a Section 106 agreement should provide for an economic appraisal either by specifying the preferred methodology and/or providing for the appointment of an independent assessor.
- 6.3.6 The report does offer some relevant case studies on the deployment of cascade mechanisms although some of these are now fairly dated and predate PPS3 and ‘Delivering Affordable Housing’. Whilst the cascade mechanisms are described in broad terms the actual clauses adopted by the case study authorities are not included and on further research Ark was able to identify only one of these agreements which included true cascade provisions to allow for grant not materialising, this being the Worcester City Council example described in Section 6.4.8 of this report. Other case studies quoted include Section 106 agreements formulated by Mid Bedfordshire District Council, Aylesbury Vale District Council, Solihull Metropolitan Borough Council, Exeter City Council and Swindon Borough Council (referred to in Section 6.4.5 of this report).

## **6.4 Specific Good Practice Exemplars**

- 6.4.1 As part of the agreed methodology for this assignment, Ark was asked to draw upon its own experience and knowledge to highlight helpful examples of good practice elsewhere. We have selected examples which are relevant to the aspects of affordable housing planning obligations which tend to prove most contentious or are the least well developed in our opinion.

6.4.2 Each example is set out under a general heading for the issue or the aspect of agreement for which it is relevant and these are:

- adoption of model Section 106 clauses
- review of viability
- securing an appropriate affordable housing provider
- securing desirable design/specification standards
- cascade mechanisms
- affordability of intermediate home ownership
- off-site contributions
- monitoring

As well as summarising the good practice of other local planning authorities worthy of consideration by the Cambridge sub-region authorities, where appropriate Ark has offered some additional commentary to clarify our advice.

### **6.4.3 Adoption of model Section 106 clauses**

Case study: The West of England Partnership

The West of England is an amalgam of 4 unitary authorities making up what was previously the administrative county of Avon. The authorities are Bristol City, Bath and North East Somerset, North Somerset and South Gloucestershire. Although there are three mixed urban and rural authorities in this foursome, the area overall is effectively Bristol and its urban and suburban hinterland.

The area is experiencing substantial economic and housing growth and this is scheduled to continue through to 2021 and probably beyond. Bristol and its urban fringe contain a number of large strategic sites.

The authorities collaborate closely on housing strategy and form the bulk of a cohesive sub-regional housing market. There is increasing integration of planning policy. Bristol has for many years published a plain English version of its standard Section106 agreement expectations supplemented by a pricing matrix for affordable housing which defines maximum prices to be paid by AHPs for affordable housing provided via a Section106 agreement.

Whilst the Bristol approach has not previously found favour with all of the other West of England authorities (a pricing matrix not being adopted in Bath and North East Somerset or South Gloucestershire for example) the four authorities have now agreed to produce a consistent series of model Section 106 clauses across the sub-region. The authorities are yet to debate whether and how to address future review of viability appraisals.

Ultimately the aim of the authorities is to adopt the model clauses within their respective Supplementary Planning Documents for affordable housing.

#### **6.4.4 An approach to viability assessment**

Case study: Cotswold District Council

Cotswold District Council adopted an affordable housing SPD in February 2007. This is a comprehensive document which established a very clear framework for delivery of affordable housing planning obligations in the district. The SPD includes a plain English description of 'standard clauses for Section 106 agreements' in Appendix B along similar lines to the approach taken by Bristol City Council. These are supplemented by model forms of legal agreement. Whilst this is relevant to the Ark assignment the particular aspect of this SPD which offers a salient example of good practice is Section 5 'Assessing Financial Viability'. Although Cotswold District Council does not offer a particular template for undertaking an economic viability test, Section 5 sets out the main factors affecting economic viability on specific schemes which the Council would expect to assess. It sets out the information it expects a developer/applicant to provide and the action which the Council will take to carry out the assessment. This methodology forms a significant part of the recommendations made in Section 7.2 of this report.

#### **6.4.5 Review of viability**

Case study: Swindon Borough Council

In 2005, Swindon Borough Council signed a Section 106 Agreement for affordable housing provision on 4,500 homes at the Southern Development Area. The Council recognised that in earlier large scale phased developments, when it had agreed affordable housing contributions at fixed levels, both the economic viability of schemes and the policy position on levels of affordable housing had changed enormously over the life of the schemes. The Council sought on the Southern Development Area project to future proof by agreeing to a phase by phase review of the scheme's potential to deliver affordable housing, accepting potential variance up or down from the level agreed at the project's inception. To date the reviews have worked against the Council as market conditions have moved adversely and the Council would be unlikely to agree again exactly the mechanism adopted for the Southern Development Area.

Case study: Bath & North East Somerset Council

Bath Western Riverside is a complex regeneration scheme located close to the centre of Bath. The scheme will benefit from high market values but also has some very high costs due to a number of factors. There will be an ongoing review process at the end of every phase comparing actual income and costs to estimated inputs in relation to a baseline viability appraisal. In the event that viability improves, then overage clauses apply that will result in the provision of additional affordable housing on the next phase of development until an upper limit is reached that equates to the Council's policy position applicable at the time the outline application was considered by members. The issue of land value has not

presented confidentiality problems, as the price to be paid will be averaged across the whole site. In addition to the Council, both EP and the Housing Corporation have asked for details of land value payments

In order to ensure that the developer is not paying too much for the land and to justify any bid for public subsidy.

Case study: Milton Keynes Council

Milton Keynes Partnership, a grouping involving Milton Keynes Council, English Partnerships and a range of affordable housing providers, operates a review provision within its framework Section 106 agreement. The reviews relate to pro-rata contributions by developers to infrastructure development in the city or to any change which may have taken place in the Council's adopted affordable housing planning policy as a result of future assessment of housing need.

The provision in the agreement is underpinned by a series of notices. A notice from the Council proposing a variation has to be accompanied by sufficient evidence (the nature of that evidence is not defined) and must accord with local, regional and national planning policy in force at the review date. The developer has a period of two months within which to serve a counter notice challenging the grounds for the variation. Failure to serve a counter notice within the two months is deemed acceptance of the variation. Failure to reach agreement between the parties institutes a dispute resolution mechanism in the Section 106.

#### **6.4.6 Securing an appropriate affordable housing provider**

Case study: Bath & North East Somerset Council

Acknowledging that planning policy and case law makes it unenforceable for a local planning authority to insist on the appointment of a preferred AHP by a developer, B&NES decided to define its expectations for housing management standards when negotiating a Section 106 Agreement with Crest Nicholson for the development of Bath Western Riverside. These housing management standards form an annex to the Section 106 Agreement and legal advice obtained by B&NES suggests that the obligations contained in the annex are consistent with statute, PPS3 and case law and are likely to be enforceable. The standards mention that a preferred partnership of RSLs operates in B&NES and across the West of England and that these preferred partners have effectively pre-qualified to meet the standards. The document makes clear that monitoring of the achievement of the standards over time will be undertaken by the local planning authority. The standards relate to Key Lines Of Enquiry for housing service inspections by the Audit Commission and cover income management, estate management, tenancy management, voids and lettings, resident involvement and maintenance.

#### **6.4.7 Securing desirable design/specification standards**

Case study: Tonbridge and Malling Borough Council

Tonbridge and Malling BC adopted a new affordable housing SPD in July 2008. Section 5 is devoted to the design of affordable housing. The SPD includes an annex which sets out various design guidance and developers are asked to submit a Design Statement with planning applications that describes how proposed schemes adhere to the annexed guidance.

For schemes funded with SHG from the 2008-11 NAHP, the SPD encompasses the need for compliance with the Homes and Communities Agency's Design and Quality Standards, including Housing Quality Indicator (HQI) targets and Building for Life criteria. The Council encourages developers to adopt these standards whether schemes benefit from SHG or not.

In particular, the SPD emphasises the need for decent size or space standards. It suggests that the Council will seek to exceed the minimum HQI scores relating to dwelling size, subject to viability. The Council in consultation with its preferred RSL partners has adopted indicative floor areas which exceed the minimum HQI scores.

#### **6.4.8 Cascade mechanisms**

Case study: Worcester City Council

Case study: This is one of the case studies highlighted in the ATLAS report 'Cascades: Improving Certainty in the Delivery of Affordable Housing for Large Scale Developments' (see Section 6.2 earlier) and the only one which appears to include genuine cascade provisions.

The scheme in question was the redevelopment and conversion of the Royal Worcester Porcelain Factory site in central Worcester and the Section 106 Agreement was signed in summer 2006 between Worcester City Council and Berkeley Homes.

The quantum and mix of affordable housing agreed between the parties (106 dwellings in a mix of 88 rented and 18 New Build Homebuy) was dependent on the selected RSL accessing Social Housing Grant. Schedule 2, Section 6 of the Agreement deals with affordable housing provision. Section 6.4 describes the cascade arrangements and requires Berkeley (or a subsequent owner) to use reasonable endeavours to co-operate with the selected RSL in securing SHG. The agreement allows for a period of one month only for the RSL to attempt to achieve grant for Phase 1. If the Council is satisfied that the owner and RSL have used reasonable endeavours to secure grant and that it has not been forthcoming then a revised quantum and mix is quoted of 69 units, of which phase 1 should be 39.

In the event that SHG is forthcoming but for less than that required to deliver 106 affordable dwellings, the obligation on the owner is to provide the number of affordable dwellings required by the Housing Corporation (now The Homes and Communities Agency) PROVIDED THAT the affordable housing revenue paid by the RSL to the owner does not reduce the viability of the development as calculated by the formula agreed between the City Council and the owner’.

The formula is an addendum which is signed by both parties and includes a ‘base appraisal’. This is a residual land valuation setting out the expected receipts to Berkeley from the market and affordable housing using agreed assumptions and the anticipated scheme costs. The appraisal concludes in a residual gross land value described as the ‘balance before land acquisition costs’. If grant is added, the balance between market dwellings and affordable dwellings can change in favour of the latter but none of the value or cost assumptions in the appraisal can change.

The approach adopted is sound and the appraisal methodology is straightforward and appropriate. The inclusion of the grant free baseline is the sensible starting point for determining a cascade provision in Ark’s opinion as well as in the opinion of the ATLAS report. The approach is vulnerable to change in some of the fundamental value and cost assumptions if the subject project is likely to unfold over a protracted period and so the cascade provision is not future proofed and this is an issue we address in our recommendations in Section 7.3 of this report.

#### **6.4.9 Affordability of intermediate home ownership**

Case study: The West of England authorities

The West of England authorities commissioned research on the affordability of intermediate home ownership (IHO) across the sub-region. The research determined an appropriate earnings range for IHO in different value zones across the housing market area. This was then translated into affordable tranches of equity to be purchased by first time buyers combined with an affordable rent payable on retained equity. The assessment of affordability assumed outgoings on mortgage and rent at no more than 25% of gross earnings as recommended in Government guidance on Strategic Housing Market Assessment and in PPS3. This helped to determine sub-regional wide policy on affordability of IHO and this has become the basis for establishing what should be delivered via Section 106 agreements.

#### **6.4.10 Off-site contributions**

Case study: South Hams District Council

South Hams is a predominantly rural district in Devon immediately adjacent to Plymouth. It experiences very high house prices particularly in relation to local earnings and this problem is exacerbated by exceptionally high levels of second home ownership. The Council has a track record of innovation in housing and planning policy formulation. It is also due to accommodate a large urban extension

to Plymouth, known as Sherford, which will secure between 4,500 and 5,500 new homes together with community facilities and new employment uses.

The Council adopted a comprehensive SPD on affordable housing in January 2008 which included detailed policies on securing off-site contributions, mainly because all developments, of whatever size, are expected to make an affordable housing contribution which ranges from:

10% for a scheme of 1 dwelling  
to 20% for 2 to 5 dwellings  
to 35% for 6 to 14 dwellings  
to 50% for 15 or more dwellings

Although the policy preference remains for on-site or in kind contributions where possible there is recognition that this is not always practicable. There are tables of quoted contribution levels where developments are up to 5 dwellings and the contributions vary dependent on the unit sizes being constructed on the subject site. The Council bases its affordable housing expectations on receiving free serviced land for affordable dwellings. It assesses its off-site contributions by equating the amount to the value of the free serviced land which has been foregone. This is assumed to equate on average to 39% of market sale values based on research commissioned by the Council. There are 5 value bands quoted in the SPD to reflect variations in house prices across the district. In a sense what the Council's policy is aiming to establish is the betterment in land value secured by the developer by developing market housing on site as opposed to affordable housing.

#### **6.4.11 Monitoring**

Case study: Carrick District Council

Carrick, in Cornwall, provides a grant-free intermediate home ownership product on Section 106 sites directly with developers. This has proved popular with local first time buyers and includes both fixed equity and limited staircasing schemes. Generally speaking the product does not require the purchaser to pay a rent on retained equity. Because the Council is reliant on developers to deliver an appropriate physical product, without the intervention of an RSL or an AHP subject to other regulatory scrutiny from The Homes and Communities Agency, it has retained some active involvement in the sales process in part to ensure compliance with its expectations. The Council maintains a 'Homeseekers Register' and refers priority applicants to developers when initial or resale opportunities arise. It only expects developers to offer a specification for dwellings equivalent to their market housing so the Council's key concern is to ensure comparability (the Council can cite examples of developers reducing kitchen units or the amount of tiling on intermediate home ownership dwellings in order to cut costs).

Largely, the Council is reliant on buyers and their valuers/solicitors acting as its eyes and ears and does not deploy any personnel specifically to check that the developer's product meets agreed expectations.

### Case Study: Colchester Borough Council

Colchester BC has been at the forefront in monitoring S106 schemes. Around four years ago the Council recruited to the post of Major Applications Support Manager, this role being created to monitor the output of S106 schemes across the authority. As a result of the work of the Major Applications Support Manager the Council is able to claim one of the best performing S106 delivery mechanisms in the region.

Colchester is sponsored by CLG through the Planning Advisory Service to provide advice and support to other councils seeking to improve the monitoring and therefore quality of S106 outputs.

Colchester has been an early adopter of the PARSOL (Planning and Regulatory Services Online Project) online enforcement and S106 enquiry system. The system is an online database for monitoring formal enforcement action and investigations of alleged breaches of planning control.

The system includes:

- Online alleged breach of planning control form – online forms have been developed to a standard specification by a range of systems suppliers to be hosted on local authorities' own systems. The forms are integrated with authorities' back office systems.
- Section 106/Conditions monitoring system- extensions to existing online planning applications databases have been provided to enable customers to track compliance information on conditions and Section 106/Obligations.

The system enables a member of the public to enquire if there are any investigations or formal enforcement actions relating to a specific property within a local authority's given jurisdiction. In addition, members of the public can submit an alleged breach of planning control directly to the authority. Members of the public can also use an online system for displaying information on compliance with Section 106/Conditions on planning applications, via a system developed and piloted at one of the PARSOL local authorities.

The system has assisted Colchester to develop sophisticated approaches to ensure that sites where S106 agreements apply deliver the intended outputs in terms of numbers, property types, tenures and quality standards.

## 7. CONSULTATION WITH HOMEBUILDERS AND DEVELOPERS

- 7.1 Ark agreed with the various authorities that it would be sensible to consult with homebuilders and developers once a draft report had been formulated. This would mean that there were specific recommendations and model Section 106 clauses for homebuilder and developer representatives to consider and that feedback would be precise and salient.
- 7.2 A workshop session was organised for 24<sup>th</sup> February 2009 to which 34 homebuilder and developer organisations were invited to be represented. The organisations were identified by the various authorities based on those which had negotiated or were currently negotiating Section 106 agreements for residential development and those which were known through the planning system to have interests in relevant sites. 14 organisations confirmed attendance at the workshop and 10 actually attended on the day.
- 7.3 Discussion and debate at the workshop focused on the key policy recommendations drafted by Ark up to that stage of the assignment. It was felt that the model clauses were too detailed and extensive to permit any meaningful discussion in a workshop context. Consequently, attendees were given a copy of the draft clauses and asked to provide any comments on these by 13<sup>th</sup> March. Some detailed comments on the clauses have been received and these have influenced the final drafting of this report and the model clauses.
- 7.4 The workshop session was extremely productive and all of the homebuilder and developer representatives had substantial relevant experience and interests and were able to challenge some of the draft recommendations in an effective and constructive way. Ark would like to acknowledge the assistance received from the workshop participants.
- 7.5 Some of the key observations and comments made by the participants in the workshop were as follows:
- questions were raised about the interface between affordable housing policies articulated in Supplementary Planning Documents and those in Core Strategies. The attendees felt that there was a tendency for too much fundamental policy information to only appear in SPDs and therefore not to be subject to independent examination,
  - when considering generalised viability testing, although the ‘archetype’ schemes and value zones approach was recognised as relevant, there was a desire to see some of the larger long-term allocated sites being subject to testing,
  - when considering review/future-proofing provisions, it is important to recognise that most schemes include overage provisions in favour of landowners or investors and that there could be conflict between these and the proposed review clauses in Section 106 agreements. Also when schemes benefit from gap funding from the Homes and Communities Agency, this brings with it overage and business plan obligations which could conflict with reviews,

- generally there was concern about the whole future-proofing concept and the degree of flexibility being proposed, particularly from a workability perspective. The 'one way only' review proposed in the draft recommendations was felt to be inequitable,
- there would be real practical difficulty in achieving additional affordable housing on later phases of larger schemes if a review suggested this was appropriate. There would be problems with re-design, additional planning applications and a risk of a breach of faith with original buyers who purchased in the belief that the affordable housing and overall design would be as per the situation prior to a review,
- there was concern that if affordable housing provision was subject to review then other Section 106 contributions might also be reviewed,
- there was a general dislike for the notion that affordable housing provision at less than a policy target was a 'concession' by a LPA. Generally there was a feeling that terminology and wording would have to be very carefully crafted as no doubt the clauses and/or policy recommendations, if adopted, could come under 'forensic examination' at appeal,
- because affordable housing policy targets are usually expressed as '40% or above' in the area, there is a concern that, at review, LPAs might seek more than the target applying at the time a Section 106 agreement was entered into,
- generally participants did not feel that it was realistic to expect Heads of Terms for Section 106 agreements to be agreed prior to registering applications. Even if the expectation was that the Heads of Terms would only relate to the affordable housing requirement, because this tends to flex with other Section 106 requirements then it may not be practical to agree in principle one contribution and not the others. Also, there was an anxiety that LPAs would push themselves to agree all Section 106 contributions ahead of registration and this would create unreasonable delay,
- one participant questioned the lawfulness of annexing housing management standards to a Section 106 agreement notwithstanding that this has happened elsewhere.

## 8. RECOMMENDATIONS FOR POLICY IMPROVEMENT

This section of the report concerns itself with aspects of the policy framework for affordable housing planning obligations in the Cambridge sub-region which require improvement and which are not picked up entirely in enhanced model clauses for Section 106 Agreements.

### 8.1 SPDs and other guidance to applicants

- 8.1.1 It is clear from the background research and consultation conducted by Ark that a minority of local planning authorities in the sub-region have published a Supplementary Planning Document dealing specifically with affordable housing.
- 8.1.2 The City of Cambridge has a recently adopted SPD and South Cambridgeshire is at an advanced stage of drafting an SPD, which largely follows the form of the City of Cambridge document. This limits the scope for updating or amending these SPDs for the time being to take account of improvements being recommended by Ark. This is ironic given the advanced state of policy formulation and exposition in these two districts by comparison with some others.
- 8.1.3 Huntingdonshire possesses a fairly developed form of SPD which is about one year post adoption. As with Cambridge and South Cambridgeshire, it will prove problematic for Huntingdonshire to attempt to revise this SPD until late 2009 at the earliest, particularly as its Examination in Public stage for the Core Strategy does not occur until March 2009.
- 8.1.4 Notwithstanding the challenges for the three authorities mentioned above, Ark recommends that all of the sub-regional districts aim to develop a comprehensive affordable housing SPD which embraces an updated series of model Section 106 clauses and incorporates the further recommendations being made in the remainder of this section of our report dealing with viability assessment, future proofing and the Section 106 negotiation process. Actual contribution targets, in terms of proportion of dwellings and tenure mix should, of course, be articulated in Core Strategies.
- 8.1.5 We further recommend that the forms of SPD should as far as practicable be consistent across the seven districts. There will be differences inevitably. The City of Cambridge will not need sections addressing rural exceptions sites for example and some districts will not wish to overplay attention to issues affecting large-scale longer term sites such as those allocated in the City of Cambridge and in South Cambridgeshire. These issues would include the level of detail on future reviews of viability on multi-phased developments or the impact of major contributions of new community infrastructure.
- 8.1.6 In order to secure maximum cohesion in affordable housing planning policy across the sub-region, a convergence plan between the seven authorities should be produced which identifies when policy improvements can expect to find their way into the statutory plan framework. For those where this will be delayed because of the status of current plan documents, Ark recommends that some form of companion guidance be produced for applicants/developers.

This can indicate the trajectory of policy and for example define how viability assessments are expected to be carried out. Obviously, until such guidance finds its way into an SPD it will lack the materiality and force which is desirable.

## **8.2 Viability assessment**

- 8.2.1 In discussions between Ark and representatives of the various districts a fair amount of attention has been given to models for conducting economic viability assessments. There are various proprietary financial appraisal tools available on the market including those promoted by GVA Grimley, The Three Dragons, Knight Frank and King Sturge (the latter two, we believe, are adopting development industry standard software produced by Argus). In themselves the appraisal tools are not a solution for achieving a reliable test founded on good evidence. They are simply mechanical devices allowing the appraisal calculations to be carried out swiftly and permitting different variables or scenarios to be tested. Much the more important consideration is whether the assumptions adopted for appraisal purposes are fair, reasonable or appropriate. Moreover, these assumptions need to be backed by reliable evidence if they are to be treated with confidence and produce a defensible position for either a local planning authority or a developer.
- 8.2.2 As will be noted from the conclusions drawn on the Blyth Valley Court of Appeal judgement, set out in Section 6.2 of the report, establishing a sound and defensible affordable housing policy target will require some assessment of its impact on the viability of residential development. Although a somewhat theoretical exercise (because each individual scheme will have its own unique combination of value and cost factors) it would be sensible for the Cambridge sub-regional authorities to establish some indicative figures for the impact of policy targets on residual land values in their areas. One approach worthy of consideration would be to establish some hypothetical scheme types (archetypes) and a range of market 'zones' based on bands of house prices. Some authorities will possess only a small range of zones whereas others may contain a wide range. The zones need not be exclusive to individual authorities. Typical assumptions could be determined for costs and values by zone and archetype and appraisals conducted to gauge the residual land values produced without public subsidy and the level of subsidy required to achieve values judged, with the benefit of expert advice, to represent reasonable returns to landowners. As a supplement to this fairly hypothetical general viability test, it may be possible, in collaboration with landowners or developers, to undertake more scheme specific but early testing of the viability of large long-term sites.
- 8.2.3 An assessment exercise such as described above will only provide a backdrop for policy making and will need to be supplemented by a consideration of the availability of Social Housing Grant, based on investment strategies going forward and on recent experience. The Homes & Communities Agency should be consulted directly as part of this process. The outcome of the assessment can only be a snapshot in time and in policy making terms, that snapshot will need to be taken initially prior to external examination of emerging policy. Such generalised or hypothetical appraisals will be no substitute for assessment of the specific characteristics of individual schemes where there is a suggestion of departure from policy and the rest of our recommendations on viability assessment, set out below,

concern themselves with the approach to assessing real schemes as part of the application/pre-application process.

- 8.2.4 Ark's opinion is that, in attempting to provide a helpful framework for implementing planning obligations, it is useful to provide applicants/developers with a template for assessing the economic viability of individual projects. However, this need only set out the various aspects of residential development economics which would need to be considered when conducting an appraisal and it need not be a specific spreadsheet based model. Applicants/developers could be alerted to the existence of the proprietary models and authorities need not focus on one form alone. All the proprietary models have strengths and weaknesses and certainly some of the appraisal conventions adopted are more common to commercial development (discount rates for cash flows assuming investment yields for example) than to traditional house building.
- 8.2.5 Of the proprietary models available, it would be most appropriate to favour the Grimley model because it was commissioned originally by The Housing Corporation and is used to help the Homes and Communities Agency to judge appropriate levels of grant investment on Section 106 schemes which have viability problems.
- 8.2.6 Returning to the key points at issue in viability assessments, the authorities should provide clear guidance to applicants/developers about what information will be required to establish whether it is appropriate for a departure from policy to be accepted or for grant to be invested in a scheme. Should a viability assessment demonstrate that a scheme requires grant in order to meet policy expectations the price to be paid by the AHP should to be examined by the authority.
- 8.2.7 As a guide, the following schedule highlights the main economic factors an authority should expect to assess, the information which will be required from the developer and the action an authority will take to carry out an assessment. Arrangements must be made by authorities to treat all information provided by developers in the strictest confidence and confidentially expectations should be passed on to any consultants or advisors appointed by the authorities to help with the assessment.

|  |  |
|--|--|
| <p><b>i. Site or building acquisition cost:</b><br/><b><i>Information to be provided by the developer:</i></b></p> | <p>How much the developer has paid or is proposing to pay for the land or building, net of any site abnormalities and including VAT if applicable.</p> <p>Whether the site or building has been fully acquired at this price and when exchange of contracts took place ('full acquisition' would not normally mean exchange of a conditional contract or entering an option agreement).</p> <p>The Council will obtain an independent opinion from a qualified professional valuer with local market knowledge of:</p> |
|--|--|

|  |  |
|--|--|
| <p><b>Action to be taken by the Council:</b></p>   | <ul style="list-style-type: none"> <li>• the value of the site or building in its existing use.</li> <li>• the value of the site or building for the proposed residential use.</li> <li>• the value of the site or building for any realistic alternative uses.</li> </ul>   |
| <p><b>ii. Construction costs:<br/>Information to be provided by the developer:</b></p> <p><b>Action to be taken by the Council:</b></p>      | <p>How much the developer is estimating to pay for all aspects of the construction of the development including abnormals, siteworks, houseworks and estate completions. Abnormals should be itemised and costed individually and general construction costs should also be expressed as a price per m<sup>2</sup> or ft<sup>2</sup> of proposed built form.</p> <p>What allowances are made within the estimated figures for building cost inflation.</p> <p>The Council will obtain independent advice from a qualified professional quantity surveyor with knowledge of the local construction sector on:</p> <ul style="list-style-type: none"> <li>• the reasonableness of the estimates for general construction.</li> <li>• The reasonableness of the estimated abnormal costs and the construction solutions which underlie them.</li> </ul> |
| <p><b>iii. Fees and Other On-Costs<br/>Information to be provided by the developer:</b></p> <p><b>Action to be taken by the Council:</b></p> | <p>An itemised breakdown of the main development and sales related fees and other costs the developer expects to incur including fees for design, engineering, planning, building control, surveying, warranties and such like, legal fees, introduction fees, marketing and direct sales costs and interest charges where identified at a scheme level.</p> <p>The Council will obtain independent advice from a qualified professional quantity surveyor and/or development consultant on the reasonableness of the estimates.</p>   |
| <p><b>iv. Projected Sale Prices for Dwellings<br/>Information to be provided by the developer:</b></p>                                       | <p>How much the developer is proposing to sell the completed dwellings for broken down by dwelling type.</p> <p>What allowance if any has been made by the developer for inflation on values up to point of sale when compared to prices applicable at the time of compiling the information.</p>  |



costs and earnings and in the standards (regulatory and aspirational) which the development ought to be achieving. These changes cannot sensibly be anticipated at the outset of the scheme, particularly not for the later phases of development.

- 8.3.3 Increasingly local authorities have been expressing concern that where they have been expected to accept lower affordable housing contributions than policy targets for economic viability reasons they foresee that the viability justification may be undone over time by changing market conditions and the benefit will accrue entirely to the developers. For current schemes in particular, the authorities find themselves having to negotiate an affordable housing contribution from a scheme close to the bottom of an economic cycle in the housing market. Values are falling whilst costs continue to rise and this reflects the constraints on mortgage availability and general uncertainty in the market rather than any change in the underlying demand pressures arising from new household formation and historically low levels of new supply. In addition AHPs are in many instances resisting the delivery of all types of intermediate housing. However both developers and AHPs are making decisions based on current market conditions and ignoring the fact that this will change. The developer can look forward to the likelihood that market conditions will improve substantially over the life of a project. In fact, on projects with a 10 to 15 year life we are likely to have passed fully through at least one further economic cycle in the housing market.
- 8.3.4 It should be regarded as reasonable that where an authority is not securing its policy position on affordable housing provision at the outset of a project then it should insist on periodic reviews to reflect changing market conditions. In most cases it will only be possible to secure Social Housing Grant for the first 3 years or so of the project so inevitably, even if it is only in relation to triggering a cascade, it will be important to carry out a review. However, Ark believes that the agreed baseline position should remain the baseline (the level of affordable housing achievable on a grant free basis) and that it should not be possible for the contribution to decrease below this as a result of future reviews. An authority may then agree to support bids for public subsidy in order to achieve 'additionality' such as more affordable housing beyond the baseline position.
- 8.3.5 No doubt developers will claim that such an approach is unreasonable because it only allows a one way review. Ark would counter that the authority has already been asked to reduce its expectations so is, in effect, already losing out and so we are simply looking for safeguards to check that it remains appropriate for the authority to go on losing out in the long term. Moreover, developers are in the business of speculating on changes in market conditions with the risks that entails. The corollary to this is that improved returns should be the potential benefit of such speculation if things change for the better, just as reduced profitability would result from change for the worse.
- 8.3.6 Bearing in mind the points made above, Ark's recommendation would be to seek reviews on major schemes to coincide with each of the public funding phases. This would mean attempting to agree with The Homes and Communities Agency what the initial grant commitment should be. The review process would need to

commence 6 months ahead of the intended completion of the funding phases in question.

- 8.3.7 Ark recommends further that the reviews be based on an agreed template or framework for inputs and outputs. Section 7.2.5 sets out the inputs and outputs to be assessed and these should form the basis of the template.
- 8.3.8 Whilst the reviews should be designed to allow variation only in the direction of improving affordable housing levels beyond the grant free baseline, it is recognised that this must be constrained within caps set by policy. Therefore, a policy target of '40% or more' should be regarded as a 40% cap if that is the best an authority could typically expect to achieve at the point it signs the Section 106 agreement.
- 8.3.9 To reflect the speculative risk taken by the developer, Ark would suggest that increases in the level of affordable contributions should only apply if the developer achieves more than an agreed percentage of improvement in return from the scheme, perhaps more than a 10% improvement on the expected margin. That way the review acts like an overage on super profits and seems fair and reasonable. Review templates will need to recognise the impact of overage obligations the developer has on a particular scheme to other parties. It would be reasonable to allow the developer an improvement of 10% in its own receivable margin before expecting an increase in the affordable housing contribution.
- 8.3.10 There will need to be cascade provisions in the Section 106 agreement to deal with the degree to which the affordable housing levels can reduce in the absence of some or all of the grant which may be agreed. Similarly it would be advantageous to include provisions for flexibility on the levels of provision of each tenure type within agreed minimum and maximum parameters. Normally any flexing instituted by the developer or AHP would be subject to approval by the authorities and, by definition therefore, there must be an expected baseline scenario at the point of agreement.
- 8.3.11 On multi-phased schemes careful thought will need to be given to how to treat a degree of variance from anticipated levels of affordable housing provision per phase and for how any future additional affordable housing contributions are realised. For the former, Ark's view would be that if as a result of accepted project planning there is an under or over provision of affordable housing (or the appropriate tenure split) on a particular phase, the aim should always be to return to equilibrium over the next phase. Any exceptions to this and indeed any proposal for an under or over provision should all be subject to approval by the local planning authority.
- 8.3.12 The Section 106 agreement will need to include certain baseline figures so that future reviews can be easily assessed. The baseline data and benchmarks would include the following:
- i. Outputs (% AH, tenure split, mix, size, affordability)
  - ii. Grant levels
  - iii. Reasonable levels of profit
  - iv. Costs (land, build, prelims and overheads, fees, other planning contributions and abnormals)

- v. Standards of design and construction
- vi. Sales income
- vii. Price to be paid by the AHP for the affordable housing.

8.3.13 The baseline data required and cascades that may be incorporated into the Section 106, beyond those currently expected as the norm, will include the following:

- i. Baseline affordable housing provision achievable on a grant free basis, below which affordable housing provision cannot go
- ii. Expected affordable housing outputs given assumed levels of grant in order to achieve additionality
- iii. What if the level of grant changes?
- iv. What if rising build standards apply to the affordable housing?
- v. What if the AHP is unable to sell or let the intermediate housing?
- vi. What if the developer makes 'super profit'.

It may be possible to cover these cascades in a standard table, perhaps with agreed formulae, which is then included within each Section 106 agreement. One possible format for such a table is set out below:

| Stage or Cascade  | %         | Tenure Split |    | Size and Mix | Affordability Outputs |
|---|-----------|--------------|----|--------------|-----------------------|
|   |           | SR           | IH |              |                       |
| <b>Policy Position</b>  | <b>AH</b> |              |    |              |                       |
| <b>Baseline Position – subsidy free</b>   |           |              |    |              |                       |
| <b>Initial Expected Delivery</b><br>- assumed grant levels<br>£x social rent<br>£y intermediate housing |           |              |    |              |                       |
| <b>Cascade 1 – profit levels</b><br>i. x%<br>ii. y%<br>iii. z%  |           |              |    |              |                       |
| <b>Cascade 2 – grant levels</b><br>(may go up or down)<br>i. £a<br>ii. £b<br>iii. £c<br>iv. £d          |           |              |    |              |                       |

8.3.14 In terms of deliverability and timescales, it is a real concern that planning approvals may be granted based on current viability and yet developers can sit on the approval for a long time until the market is more favourable. Ark would recommend that authorities include a review mechanism for any scheme where the affordable housing is not completed within 3 years of the planning decision regardless of whether it is a major scheme or not. In addition where the Council agrees to support grant funding we would expect the developer to be asked to use reasonable endeavours to complete the affordable housing within agreed timeframes. A review mechanism covering the points set out in this paragraph will be more difficult to achieve in planning policy and planning law terms than review on larger multi-phased schemes. Expert planning law opinion on such a provision ought to be procured before such a policy is introduced.

8.3.15 For the avoidance of doubt, Ark's recommendations on review provisions relate to the affordable housing obligations in Section 106 agreements and not other contributions. We are not recommending that authorities have the right to request additional contributions of other types following a review of a project.

#### **8.4 Negotiating Section 106 Agreements**

8.4.1 Resolving complex Section 106 agreements place local planning authorities under extreme pressure in terms of determining planning applications within the Government's guideline 13 week period. Failure to achieve determination within the 13 weeks affects local planning authorities' reported performance against the target of determining 60% of major applications within this period. 65% of minor applications are expected to be determined within 8 weeks.

8.4.2 From discussions with the Cambridge sub-region authorities and others it is felt that determination of an application should include resolution of planning obligations and completion of the Section 106 agreement. It is too risky to leave final resolution of Section 106 agreements to a condition imposed on a planning consent requiring the agreement to be signed in a form satisfactory to the planning authority before the consent can be implemented. Neither local planning authorities nor developers would regard this as a satisfactory position.

8.4.3 To offer any realistic prospect of achieving a consent within 13 weeks of registering applications, local planning authorities should seek to have agreed heads of terms for the affordable housing planning obligations prior to registration. Ark is not aware of any authorities which have attempted to insist that the agreed heads of terms form part of the information required essential to registration of an application. We do not know whether such a policy position would be defensible and prime facie would judge it to be unreasonable. However, it is advisable, in accompanying guidance on the nature of Section 106 clauses the authority would expect to secure, set out in an SPD, that an authority states clearly that it will endeavour and would prefer to agree heads of terms on Section 106 affordable housing provisions prior to registering applications.

- 8.4.4 As mentioned in Sections 5 and 6 earlier in this report, referring to involvement of AHPs in the negotiation of Section 106 agreements, it is desirable that this should occur as early as possible in the process. However, planning case law will not support local authorities insisting on the appointment of a preferred AHP. Developers will often resist selecting an AHP until either the heads of terms or the actual Section 106 agreement are completed. Certainly where grant is required it is much more likely that the local authority can secure early involvement for an acceptable AHP. Indeed, early involvement for The Housing Corporation, preferably in a task group for larger schemes, is essential and could not sensibly or realistically be resisted by a developer.
- 8.4.5 Even where the selection of an AHP is delayed and/or cannot be influenced by a local authority, Ark recommends that the Cambridge sub-regional authorities expect a series of housing management standards to be annexed to the Section 106 agreement, especially for larger applications. This would follow the good practice precedent set by Bath and North East Somerset Council and described earlier in Section 6.3.6 of this report.

## 9. RECOMMENDED MODEL SECTION 106 CLAUSES

- 9.1 Most of this section is set out in the form of a schedule to a Section 106 Agreement dealing with the provision of affordable housing. The clauses reflect emerging good practice as identified by Ark and are written in a form which ought to be capable largely of being applied to a real agreement, i.e. they are legalistic and aim to be certain in meaning. Notwithstanding this, Ark is not a legal practice and it would be sensible for the Cambridge sub-regional authorities to procure a legal opinion on the proper enforceability of the clauses.
- 9.2 Not every clause will be relevant to every scheme. The model clauses are intended to cover most issues connected to an affordable housing planning obligation which might appropriately be dealt with in a Section 106 Agreement. There is therefore potential, as requested in the assignment brief, for authorities to pick and mix the clauses to suit the particular circumstances of their schemes.
- 9.3 Notwithstanding the points made earlier in this report about the enforceability of a local authority's right to approve an AHP, the model clauses are drafted to permit an authority such a right. Therefore, potentially this aspect of the model clauses could be open to challenge.
- 9.4 The model clauses are as follows:

### **DEFINITIONS relating to Affordable Housing**

The words and expressions below shall mean as follows:

- 1.1 "1985 Act" means the Housing Associations Act 1985
- 1.2 "1996 Act" means the Housing Act 1996
- 1.3 "Access" shall mean the provision of roads [footpaths and cycleways] to an adoptable standard together with all rights and easements over the said roads [footpaths and cycleways] to provide access and egress to the Affordable Dwellings
- 1.4 "Actual Market Value" means the market value of an Affordable Dwelling assessed in accordance with the provisions of the Homes and Communities Agency's Shared Ownership Lease Schedule 5 that deal with a Staircasing Event.
- 1.5 "Affordable Dwelling" shall mean a Dwelling forming part of the Affordable Housing together with Access and such entrance way corridors parking areas and other ancillary areas as are necessary for the enjoyment of such a dwelling [as set out in Schedule X].
- 1.6 "Affordable Housing" means affordable housing as described and defined in Annex B of Planning Policy Statement 3: Housing (2006) dated November 2006 and in Annex B of the document entitled: "Delivering Affordable Housing" dated November 2006, or any Planning Policy Statement Guidance Notes or Circulars which may supersede it and which are current at the date of this Agreement.

- 1.7 "Affordable Housing Contract" means: a binding contract with an approved Affordable Housing Provider (AHP) for:

[Delete for the correct option as applicable]

[the sale or an agreement for lease of the relevant part of the Affordable Housing Land; or a contract for sale or agreement for lease for the sale or long lease (here meaning a lease of no less than 125 years) of completed Affordable Dwellings; or a binding contract for sale or agreement for lease combining the sale or long lease of the relevant part of the Affordable Housing Land with a contract for the construction of the Affordable Dwellings on that land] which contract for sale or agreement for lease in each such case includes:-

- (a) terms requiring the Affordable Housing Provider to offer Nomination Rights to the Council in relation to the Social Rented Units and the HomeBuy Zone Agents in respect of the Shared Ownership Units;
  - (b) full and free rights of Access subject to any standard conveyancing requirements in respect of pro rata payments relating to the repair and maintenance of such Access pending adoption;
  - (c) full and free rights for the passage of Services through Service Media which shall be in the adjoining land up to and abutting the boundary to the relevant part of the Affordable Housing Land subject to any standard conveyancing requirements in respect of pro rata payments relating to the repair and maintenance of such Service Media pending adoption; and
  - (d) such other commercial terms and conditions as may be reasonably required by the relevant owner and/or the developer and/approved AHP;
- 1.8 "Affordable Housing Land" " shall mean those parts of the Land edged red on the plan number X annexed to this agreement which shall be identified as Affordable Housing and ancillary space to include car parking
- 1.9 "Affordable Housing Provider" (AHP) shall mean an organisation selected jointly by the Owners and the Council and approved by the Homes and Communities Agency and which is either:
- (i) a Registered Social Landlord within the meaning given in Part 1 of the Housing Act 1996; or
  - (ii) another organisation whose object is or includes the provision and or management of Affordable Housing
- 1.10 "Cluster" shall mean a group of Affordable Dwellings

- 1.11 "Dwelling" shall mean any unit of self-contained residential accommodation constructed pursuant to the Planning Permission.
- 1.12 "HomeBuy Zone Agent" means a body appointed or approved by the Homes and Communities Agency to act as agents for the allocation of affordable dwellings disposed of by way of intermediate tenure (including Shared Ownership Units).
- 1.13 "Homes and Communities Agency" shall include any successor body in substitution for the Homes and Communities Agency.
- 1.14 "Index Linked" shall mean the indices based on RPI plus ½ per cent as appropriate.
- 1.15 "Infrastructure" means all sewerage plant machinery apparatus and equipment and sewerage works drains rising mains and associated manholes mains inspection chambers headwalls public utilities bridges (including any railway and/or river crossings) tunnels and underpasses culverts lagoons balancing ponds flood storage areas pumping stations or pumping apparatus flood plains sound barriers noise attenuation works screens or bunds strategic planting and landscaping open space and other main amenities and accommodation works and all other works Services and Service Media apparatus and equipment that may be required pursuant to this Agreement or pursuant to any other planning or infrastructure agreement or otherwise needed in order to commence construct complete sell use and occupy the Development and/or to market and sell all or any of the Dwellings comprised in the Development or any variation amendment or substitution thereof or any Reserved Matters Approvals pursuant thereto.
- 1.16 "Intermediate Housing" shall mean an Affordable Dwelling that is within the definition of intermediate housing contained in Planning Policy Statement 3 Housing (November 2006)
- 1.17 "Intermediate Rented Unit" shall mean an Affordable Dwelling that forms part of the Affordable Housing where:
- (i) the rents are capped at 80% of the local market rate;
  - (ii) the tenancies are periodic not permanent i.e. Assured Shorthold Tenancies; and
  - (iii) the tenancies are not subject to the Right to Acquire.
- 1.18 "Long Lease" shall mean a lease for a term of at least 125 years.
- 1.19 "Management Standards" means the standard of long term housing management expected from the AHP or its managing agent as set out in the document [ ] annexed
- 1.20 "Market Dwelling" means any Dwelling other than an Affordable Dwelling

- 1.21 “Market Value” means (in relation to the initial calculation of the Subsidy only) the market value as assessed by a Valuer of a Dwelling as confirmed to the Council by the relevant Approved AHP (such value being calculated in accordance with the RICS Appraisal and Valuation Standards (5th Edition)) and being the estimated amount for which in the absence of this Agreement residential units of equivalent location specification size state of repair and condition and which are not restricted to use as affordable housing should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s-length transaction after proper marketing wherein the parties had each acted knowledgeably prudently and without compulsion and on the following assumptions:-
- (a) no discount is to be allowed for bulk sales or on the basis that more than one property is being sold to the same purchaser;
  - (b) it is sold with vacant possession and with good and marketable title;
  - (c) the title is free from encumbrances;
  - (d) the valuation is for the unrestricted freehold *or as appropriate leasehold (of an initial minimum 125 year term)* with vacant possession which, for the avoidance of doubt, ignores any use as Affordable Housing;
  - (e) that the property is newly built, decorated, fully equipped for sale and serviced and fit for immediate occupation;
  - (f) that the valuation is for sale of an individual unit and not part of a larger sale;
  - (g) all necessary Access landscaping and open space have been laid out and completed and all other Dwellings within the Development have been built, sold and occupied;
  - (h) assuming the Application Land is free from contamination;
- 1.22 New Build HomeBuy means the Government initiative known as “New Build HomeBuy” as set out in the document entitled “Delivering Affordable Housing” dated November 2006
- 1.23 “Nominations Agreement” means a nominations agreement in respect of the Affordable Housing in favour of the [Council/HomeBuy Agent] and that will be substantially in the form attached at Annex .....
- 1.24 Nomination Rights” means;
- (a) in respect of Social Rented Affordable Housing Units for the Council the opportunity to refer potential occupiers of the Social Rented Affordable Housing Units to the AHP [pursuant to a Nominations Agreement];

- (b) in respect of New Build Homebuy or other Intermediate Housing Units the HomeBuy Zone Agents will be afforded the opportunity to refer potential occupiers of the Intermediate Housing Units to the AHP;
- 1.25 “Occupation” means first residential occupation of a Dwelling save for the purpose of construction fitting out or marketing and the expressions “Occupy” and “Occupied” shall be construed accordingly.
- 1.26 “On Costs” means any reasonable costs incurred by an AHP in relation to any transaction regarding Staircasing Receipts as described in Sub-Paragraph 2.5 of Schedule 5 of the Homes and Communities Agency Shared Ownership Lease which are not to be reimbursed by any other person.
- 1.27 “Practical Completion” means substantial completion of a Dwelling to a stage where it is fit for occupation.
- 1.28 “Public Subsidy” means funding of whatever kind made available by the Homes and Communities Agency whether by way of grant, equity stake or other mode of investment or any other grant invested by a public or statutory body.
- 1.29 “RPI” means the General Index of Retail Prices compiled and published by the Office of National Statistics or any other such index that substitutes the General Index of Retail Prices which for the avoidance of doubt shall be used as the baseline index for each annual change where relevant.
- 1.29 “Rental Agreement” means an assured tenancy in respect of a Social Rented Affordable Housing Unit under which the rental payments are in accordance with the Target Rents]
- 1.30 "Services" shall mean the supply of water electricity gas telephone and the disposal of foul and surface water.
- 1.31 “Service Media” shall mean all pipes sewers mains ducts conduits gutters watercourses wires cables channels flues and ducting lasers optical fibres electronic data or impulse transmission communication or reception systems broadband and all other conducting media and any other apparatus.
- 1.31 “Shared Equity Units” shall mean those Affordable Dwellings where the occupier purchases a proportion of the equity but pays no rent on the other retained proportion and is not permitted to staircase.
- 1.32 “Shared Ownership Units” shall mean those Affordable Dwellings where the occupier purchases a proportion of the equity but pays no rent on the other retained proportion and is not permitted to staircase.
- 1.33 “Shared Ownership Lease” means a lease or sub lease under which an Affordable Dwelling may be disposed of by way of shared ownership or

shared equity sale and/or lease (including New Build HomeBuy) granted at a premium to be paid by the tenant or sub tenant upon completion or raised by way of mortgage or charge and under which the provisions of the lease or sub lease enable the tenant or sub tenant to acquire the balance or an increased share of the legal or equitable interest in the relevant Dwelling including The Homes and Communities Agency standard Shared Ownership Lease.

- 1.34 “Shared Ownership Unit(s)” (including New Build HomeBuy) means an Affordable Dwelling(s) [which are identified as such in accordance with Schedule X and] which are intended to be disposed of by way of Shared Ownership Leases
- 1.35 “Social Rented Affordable Housing Unit” shall mean an Affordable Dwelling [identified as such in accordance with Schedule X] and which is to be let on an assured tenancy at Target Rents.
- 1.36 “Staircasing Event” means any occasion on which a lessee of a Shared Ownership Unit acquires additional equity in that unit pursuant to a Shared Ownership Lease or a tenant of a Social Rented Affordable Housing Unit acquires a share or the whole equity in their property under any current or future legislation that applies to Affordable Housing granting tenants the right to acquire the property.
- 1.38 “Staircasing Receipts” means payments made to the AHP (less reasonable On Costs) as a result of a Staircasing Event by a shared ownership lessee tenant or any other person for the acquisition of equity in a Dwelling pursuant to a Staircasing Event.
- 1.39 “Subsidy” means the amount expressed in pounds of the difference between;
- (a) the price (including land) attributable to the disposal of Affordable Dwelling to an AHP (being for the avoidance of doubt the price to be received from the AHP pursuant to an Affordable Housing Contract by an Owner as at the date of exchange of contracts of the Affordable Housing Contract and notified to the Council in writing and the relevant AHP; and
  - (b) the Market Value attributable to that Affordable Dwelling (including land) as at the date of exchange of contracts for the sale and purchase of that Affordable Dwelling to an AHP as agreed between the relevant owner and the AHP pursuant to an Affordable Housing Contract assuming it to have been completed and ready for residential occupation as at that date and notified to the Council in writing (such Market Valuation to have been certified by a Valuer)

- 1.40 “Target Rents” means either:
- (i) the Homes and Communities Agency/Tenant Services Authority target rents system PROVIDED THAT if The Homes and Communities Agency/Tenant Services Authority target rent system shall cease to operate or shall not have been revised in the year of the date of grant of the relevant assured tenancy then the last published target rent index linked to the increase (if any) in RPI plus 0.5% shall apply instead.
  - (ii) such other measure of rental affordability as may be submitted by the Owners or Developers and approved by the Council that retains the affordable housing at affordable prices or
- 1.41 “Valuer” shall mean a Member or Fellow of the Royal Institution of Chartered Surveyors being a chartered valuation surveyor of at least 10 years post qualification experience and appointed by the AHP and acting in an independent capacity.

## **Affordable Housing Obligations**

### **Covenants relating to Affordable Housing**

2. Unless otherwise agreed in writing by the Council the Owner on behalf of itself and its successors in title to the Land with the intention that the following provisions shall bind the Land and every part of it into whomsoever’s hands it may come (with the exception of individual purchasers of plots identified for Market Dwellings) covenants with the Council that;

#### **Quantum**

- 2.1 X% (..... percent) of the total number of Dwellings constructed pursuant to the Planning Permission (rounded up or down to the nearest whole Dwelling) shall be provided as Affordable Housing.

#### **Distribution**

- 2.2 The location of the Affordable Dwellings shall be substantially in accordance with the Plan [X] agreed with the Council and annexed to this Agreement.

#### **Clustering**

- 2.3 Each Cluster shall be physically separate from and discontinuous with any other Cluster and there shall be no more than [ ] houses and [ ] flats within any Cluster.
- 2.4 The Affordable Dwellings shall not be visually distinguishable from the Market Dwellings constructed on the Site.

**Tenure**

- 2.5 [%] of the Affordable Dwellings shall be provided as Social Rented Affordable Housing Units (rounded up or down to the nearest whole Dwelling); and
- 2.6 [%] of the Affordable Dwellings shall be provided as New Build Homebuy Units (rounded up or down to the nearest whole Dwelling);
- 2.7 [%] of the Affordable Dwellings shall be provided as Shared Equity Units/Shared Ownership Units (rounded up or down to the nearest whole Dwelling);
- 2.8 [%] of the Affordable Dwellings shall be provided as Intermediate Rented Units (rounded up or down to the nearest whole Dwelling);

**Type by Tenure**

- 2.9 The mix of Affordable Dwellings rounded up or down to the relevant whole number shall be as follows:-

**Social Rented Affordable Housing Units consisting of: (Note: Need to show plot numbers, bed size and unit size in m<sup>2</sup>).**

.....

**Shared Ownership Units consisting of:**

.....

**Shared Equity Units consisting of:**

.....

**Intermediate Rented Units consisting of:**

.....

or such other tenure as agreed in writing with the Council's Director of

.....

Note: This breakdown may need to appear by phase for a large multi-phased project noting the need to aim for equilibrium in mix by phase and when this proves impractical on a particular phase that the mix should be returned to that expected position within the next phase.

**Delivery Mechanism**

- 2.10 All Affordable Dwellings shall transfer to an Approved AHP and other than where justified following an assessment of economic viability in accordance with the Council's policy shall be provided without recourse to Public Subsidy provided always that the Approved AHP may use its own resources borrowings rental income receipts from sales/persons exercising any right to

acquire under the 1996 Act or to staircase (other than receipts from the right to acquire under the 1996 Act or a Staircasing Event in respect of the other Affordable Dwellings as described in Schedule x) or other sources of finance to fund the acquisition of Affordable Dwellings and may use any available public subsidy to fund the acquisition of Additional Affordable Housing in combination with the Staircasing Receipts reserved and set aside pursuant to this Agreement.

- 2.11 The Owner will not permit the occupation of any Market Dwellings until it has entered into the Affordable Housing Contract with an AHP in relation to the Affordable Dwellings and before the Practical Completion of any of the Affordable Housing Units in accordance with the Affordable Housing Contract [or legal completion of transfer of Affordable Housing Land to the Council].
- 2.12 No more than [50%] of the Market Dwellings shall be Occupied until [75%] of the Affordable Dwellings shall have achieved Practical Completion and shall have been transferred to an AHP.
- 2.13 No more than [75%] of the Affordable Dwellings shall be Occupied until [50%] of the Market Dwellings shall have achieved completion.
- 2.14 The Owner will give written notice to the Council when the legal transfer of 50% of the total number of Market Dwellings and 75% of the Affordable Dwellings shall have been achieved.

### **Review and Resulting Variation in Affordable Housing Provision**

- 2.15 In the event that the Affordable Housing contribution is less than the policy expectations set out in the Council's Local Development Framework applying at the time of agreement and where the scheme (Affordable Housing and Market Housing) will complete more than 3 years from the date of agreement, the Council will require a review of the economic viability of the scheme.
- 2.16 The review will be conducted 18 months after the date of agreement in accordance with the template for testing economic viability included at annex ..... As a result of changes in the financial characteristics of the scheme resulting in an improvement to the developer's forecast profit for the remainder of the development not completed at the time of review by more than .....%, the affordable housing contribution will be increased. The level of increase in contribution will be such as to return the economic viability forecast to a position where the forecast profit will equate to the forecast percentage level when this agreement was completed plus the tolerance of .....%

- 2.17 For schemes continuing for more than 4 years from the date of agreement, further reviews will be conducted in accordance with these provisions on a cycle of one review each 18 months provided a scheme is at least 1 year from forecast completion at the point of the final review being conducted.
- 2.18 When considering how the affordable housing contribution should be increased following a review, the Council will seek an increase in dwelling types and tenures which are supported by recent evidence on housing needs and their relative priority.
- 2.19 A variation to the quantum or mix of Affordable Housing will be confirmed by issue of a Deed of Variation to this Agreement.

### **Availability of Grant and Variation in Affordable Housing Provision**

- 2.20 Where the Affordable Housing contribution set out in clauses 1.1 to 1.8 of this agreement is dependent on Public Subsidy and where at the date of this agreement there is no commitment from The Homes and Communities Agency (or other provider of Public Subsidy) to provide the Public Subsidy to

the AHP then the level of Affordable Housing contribution can decrease in accordance with the following provisions:

- (a) if Public Subsidy is not forthcoming at all, then the Affordable Housing contribution will be adjusted to the baseline position as set out in table 1 in annex ..... for any period of the scheme's development when no Public Subsidy is available,
- (b) if Public Subsidy is forthcoming at a level less than that agreed between the Owner and the Council, as set out in table 2 in annex ....., then the Affordable Housing contribution will be adjusted pro-rata between the levels indicated in tables 1 and 2 in annex .... for any period of the scheme's development where Public Subsidy is lower than the agreed level.
- 2.21 Where the Owner has demonstrated to the satisfaction of the Council that it is unable to meet the Council's policy expectations for the provision of Affordable Housing because it would not be economically viable so to do the Council will use its reasonable endeavours in conjunction with the AHP to attract Public Subsidy at the levels indicated in table 2 in annex ..... in order to achieve the agreed Affordable Housing contribution.
- 2.22 For schemes continuing beyond a period for which a commitment to provide the Public Subsidy has been secured, a review will be conducted in accordance with the provisions of this clause and of clause 1.14 of this agreement.

### **Affordability of Intermediate Housing**

2.23 **Note:** each LA to consider current policy and write own paragraph based on its own policy

### **Shared Ownership Units**

2.24 Subject to Clause [ ] of this Agreement and paragraph [ ] of this Schedule the Shared Ownership Units shall not be disposed of on their initial sale other than by way of Shared Ownership Lease unless otherwise agreed in writing by the Council;

### **Social Rented Affordable Housing Dwellings**

2.25 Subject to clause ..... of this Agreement and paragraph [ ] of this Schedule the Social Rented Affordable Housing Units shall not be disposed of other than by way of a Rental Agreement unless otherwise agreed in writing by the Council and the AHP shall use reasonable endeavours to procure that each Affordable Housing Unit shall be excluded (so far as legally possible) from:-

- i. any Voluntary Purchase Grant scheme as referred to in the 1995 White Paper 'Our Future Homes' and/or the right to acquire as referred to in the Housing Act 1996
- ii. any right to buy introduced in favour of the occupiers of the Affordable Housing Units and/or
- iii. from any other mechanism that could result in any of the Affordable Housing Units becoming available for sale in the private housing market

### **Nomination rights**

2.26 The terms of any transfer of an interest in an Affordable Dwelling to an AHP shall provide that:

2.26.1 in respect of all first lettings of all Social Rented Affordable Housing Units and 75% of all true voids in terms of subsequent lettings of Social Rented Affordable Housing Units the Council shall be given Nomination Rights pursuant to a Nominations Agreement;

2.26.2 in respect of all first lettings of all [Intermediate Rented, Shared Equity, Shared Ownership Units], the [the Council or HomeBuy Zone Agent] shall be given Nomination Rights and the AHP shall use reasonable endeavours to enter into a Nomination Agreement with the [the Council or HomeBuy Zone Agent] in relation to those Shared Ownership Units pursuant to the draft agreement in Annex ...

**Note:** Problematic in application as a result of the sub-regional CBL scheme and is worthy of further debate.

### **Standards of Development**

- 2.27 The Social Rented Affordable Housing Units and Intermediate Housing must be constructed to meet or exceed the Design and Quality Standards April 2007 applicable from 1/04/2008 and in force at the time of commencement of the Development or in accordance with such other guidance as shall be issued by the Homes and Communities Agency or its successor and supplemented by the achievement of: Housing Quality Indicator (version 3) unit minimum scores of Size, Layout, Noise and Services, Accessibility and Energy and the Joseph Rowntree Foundation Lifetime Homes and the achievement of Secured by Design standards.
- 2.28 All Affordable Dwellings shall be built to meet or exceed Level 3 of the Code for Sustainable Homes and in addition any subsequent changes in Building Regulations will need to be met at a minimum.

**Note:** For longer term schemes, aspirational Code levels may be inserted in the agreement for future phases.

### **Satisfaction of Affordable Housing Requirement**

- 2.29 Once the Affordable Dwellings equating to X% (..... percent) of the total Dwellings approved pursuant to Reserved Matters Approvals shall have been identified by reference to those approvals then any residual areas of Affordable Housing Land may be developed for Market Dwellings.
- 2.30 The amount of the Subsidy and the date of any Affordable Housing Contract for disposal to an AHP in respect of each Affordable Dwelling shall be provided to the Council by the AHP together with a plan identifying the Affordable Dwelling to which that Subsidy relates

### **Service Charges and exclusion of liability for payments towards maintenance of public open space**

- 2.31 None of the individual purchasers tenants or occupiers of an Affordable Dwelling shall be required to make any contribution towards the maintenance of areas of public open space within the Application Land. The service charges payable by the occupiers of any Affordable Housing that are developed as flats shall be ..... Ground rents for the Affordable Housing shall be at a peppercorn.

**Note:** Each authority to include its own policy position on service charges/caps.

### **Application of Staircasing Receipts**

- 2.32 On the occurrence of any Staircasing Event relating to an Affordable Dwelling the Owner shall:

- (a) ring fence any equity released (including any capital gain) from a Shared Ownership Lessee staircasing under or out of the Shared Ownership Lease or a tenant of a relevant Affordable Housing Unit exercising any Right to Acquire after the deduction of the legal costs, agent fees and other costs reasonably incurred in connection with the transaction which may include any sums repayable to the Homes and Communities Agency or the Council and/or to any mortgagee resulting from such transaction (the "Relevant Equity Release") and to the extent that the Relevant Equity Release is not so applied it shall be applied towards the provision of Additional Affordable Housing within the ..... area to offset the loss of Affordable Housing in the area caused by a Shared Ownership Lessee staircasing under or out of the Shared Ownership Lease or a tenant of a relevant Affordable Housing Unit exercising the Right to Acquire. The Owner shall notify the Council's Director of ..... of any Shared Ownership Lessee purchasing further equity in any Relevant Affordable Housing Unit or any tenant exercising the Right to Acquire.
- (b) The provisions of paragraph (a) above shall not apply where there is a statutory or regulatory requirement to account for the Staircasing Receipts to any other body;
- (c) the Owner shall procure that :
- all Staircasing Receipts are paid into an interest bearing account (including any interest accrued thereon) and shall procure an annual audited account to the Council demonstrating details of all receipts from the sale of any interest in Affordable Housing (including the dates upon which the Staircasing Receipts were received.
  - a record of all Staircasing Receipts are kept
  - that record is made available to the Council on demand
  - any Staircasing Receipts (including accrued interest) shall only be used for the provision of Additional Affordable Housing within the area or district
  - the AHP shall use reasonable endeavours to ensure the Staircasing Receipts are committed to the provision of Additional Affordable Housing within 3 years and spent within 5 years unless otherwise agreed in writing with the Council. In the event of any
- dispute then Independent Arbitration will be entered into by both parties.

### **Monitoring**

2.33 The Owner shall procure that the number and type of Affordable Housing will be monitored in order to ensure compliance with this Schedule ..... and shall by the 1<sup>st</sup> February and 1<sup>st</sup> August in each calendar year make a written return to the Council for the preceding six months detailing:

- the cumulative total and location of Dwellings Occupied for the whole site
- the number of Affordable Housing Dwellings completed with a breakdown specifying the number Affordable Housing Dwellings built and occupied with details of their tenure and unit type and size
- the number location and tenure of the Affordable Housing Dwellings with details of the rent and service charges and Market Value and equity sold to the occupier if under a Shared Ownership Lease
- the amount of receipts following a Staircasing Event

### **Mortgagee in Possession**

2.34 A mortgagee or chargee appointed by a mortgagee acting pursuant to the terms of a legal charge or mortgage shall be entitled to dispose of an Affordable Housing Unit free from the provisions of this Agreement, subject to the following:

- (a) The mortgagee or chargee will notify the Council in writing of its intention to exercise its power of sale
- (b) The mortgagee or chargee shall use its reasonable endeavours to dispose of the Affordable Housing Unit to an approved RSL or AHP nominated in writing by the Council within 28 days of the Council receiving notification under (a) above.
- (c) In the event of a nomination not being made under (b) above or a sale to a nominated Approved RSL or AHP not being completed within 3 months of a nomination being made the mortgagee or chargee may dispose of the Affordable Housing Unit on the open market free from the restrictions in this Agreement
- (d) The Council shall in formulating or promoting any arrangements in respect of the Affordable Housing Unit give consideration to protecting the interests of the chargee in respect of monies outstanding under the charge or mortgage

2.35 The mortgagee shall, on completion of the sale of any Affordable housing Unit pursuant to paragraph [ ] above, apply the proceeds of the sale in the following order of priority:

- (a) To the mortgagee in respect of payment of all monies due under its legal charge or mortgage.

- (b) To the mortgagee in respect of the reasonable costs incurred in connection with the sale and discharge of the legal charge or mortgage.
- (c) To the Council the balance of the proceeds of sale up to the equivalent of the Subsidy.
- (d) To the Approved RSL or AHP against whom the mortgagee exercised its rights under its legal charge or mortgage the balance of the proceeds.

### **Releases**

2.36 It is agreed and declared that:

- 2.36.1 The provisions of paragraph [ ] above shall cease to bind any of the Affordable Housing Dwellings if in relation to that Affordable Housing Dwelling it shall have been sold under a shared ownership lease and the leaseholder (or its mortgagee) has staircased his ownership under the lease to 100 percent; and