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Section 106 Agreements
– Maximising your assets

Vicky Kells – Partner
Social Housing Finance Team
Section 106 Agreements

* What are the funder’s concerns?

* Financial and works obligations – issues on large scale developments

* Affordable housing obligations – mortgagee exclusion clauses

* Other affordable restrictions

* Example clauses

* Summary/Practical tips
What are the funder’s concerns?

※ Binding obligations – run with the land

※ Successors in title

※ Ability to realise security

※ Reduction in value

※ Unacceptable as security
S106 – financial/other obligations

☆ What is critical to a funder?

– Satisfaction of all financial obligations (if triggered)
– Completion of works/other obligations (if triggered)
– Lender may deduct value of outstanding obligations from security value if not satisfied (or refuse to accept as security)
– Issues on large scale developments
S106 – financial/other obligations

How your development teams can assist
- If involved in S106 negotiations, exclude liability for all obligations (other than affordable)
- Request variation of S106 on acquisition if no existing exclusion clause

Other solutions?
- Indemnity from developer
- S106 indemnity insurance
S106 – mortgagee exclusion clauses

* Use of language/legal terms:
  – Mortgagee in possession
  – Exercise power of sale
  – Reasonable v. best endeavours
  – Lender/lending money to the association
  – Successor in title
  – Receiver
  – Missing “e”
S106 – affordable obligations

※ Full exclusion – not bind mortgagee/receiver/successors
※ Conditional exclusion
  – Moratorium period less than 3 months in total
  – MV-ST v. EUV-SH
  – Price must cover advance monies plus interest and costs OR
  – Sale price = open market value OR
  – Mortgagee not required to act contrary to its duties and Local Authority must give due consideration to amount outstanding under the mortgage
Affordable Housing restrictions

- S.106 agreements
- Nominations agreements
- Leases
  - user covenants
  - alienation covenants
- Transfers
  - restrictive covenants
- Restrictions on title
  - consent from Local Authority
Example clauses

* The affordable housing obligations in this Agreement shall not bind any mortgagees in possession of any or all of the Affordable Housing Units hereby permitted.
  – Only relates to affordable obligations
  – Refers only to mortgagees in possession
  – Does not include chargees or receivers
  – Does not include successors in title
Example clauses

“Chargee” means any mortgagee or chargee of the Registered Social Landlord or any receiver or manager (including an administrative receiver) appointed by such chargee or mortgagee or the successors in title to such mortgagee or chargee or receiver.

No Registered Social Landlord, Chargee or their successors in title shall be bound by the terms of this Agreement [except for Schedule [containing affordable provisions]]
Example clauses

* The provisions of Schedule [containing affordable housing provisions] shall not bind any Chargee [provided that the Chargee shall first have complied with the Chargee’s Duty]

* Chargee’s Duty must contain a TOTAL period of no more than 3 months plus the proviso – at all times the rights and obligations in this paragraph shall not require the Chargee to act contrary to its duties under the charge or mortgage and that the Council must give full consideration to protecting the interest of the Chargee in respect of moneys outstanding under the mortgage or charge
Summary

- Try to be involved in negotiation of S106 provisions (even where you are not the developer/landowner)

- Review your existing S106 agreements for funding purposes

- If restricted, seek variation of S106 at the earliest stage.

- Use leverage with housing teams/executive members at Local Authorities

- Keep a register of stock affected by affordable housing restrictions to aid planning of funding
*clarke willmott

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