

Planning Policy - East Devon District Council
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Our ref: CP011/0939/0939/406256.00072

Your ref:

08 May 2019

By Post and Email - [REDACTED]

Dear Sirs

Representations on the Draft Affordable Housing SPD

Introduction

We are jointly instructed by Blue Cedar Homes Ltd and Baker Estates Ltd to provide representations on the proposed East Devon Draft Affordable Housing Supplementary Planning Document (March 2019).

We would comment on the draft SPD as follows:

Comments relating to the SPD as a whole

Need for the Affordable Housing SPD

- 1.1 The SPD largely comprises a restatement of Local Plan policy or the restatement (and often misstatement) of national level policy and guidance. As a result, it is difficult to understand the justification for or the purpose of the SPD.
- 1.2 It is important to critically assess the purpose of the SPD as this affects the procedure required to be carried out in formulating and adopting the policies.
- 1.3 Regulations 5 and 6 of The Town and Country Planning (Local Planning) (England) Regulations 2012 provide, insofar as relevant:

“(1) ...the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

Appendix 1(i) the development and use of land which the local planning authority wish to encourage during any specified period;

Appendix 2(ii) the allocation of sites for a particular type of development or use;

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Appendix 3(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

Appendix 4(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

Appendix 5...

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

Appendix 6(i) relates only to part of the area of the local planning authority;

Appendix 7(ii) identifies that area as an area of significant change or special conservation; and

Appendix 8(iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.

6. Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan.”

- 1.4 Therefore, if the policies contained within a draft SPD fall within any of the categories set out in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), the statutory process for the adoption of DPDs (including submission to the Planning Inspectorate for examination in public) must be followed. The Council cannot decide that, by badging policies as a SPD, a less comprehensive or robust process should be followed.
- 1.5 Given that the draft SPD restates/misstates/paraphrases local plan policies and national planning policy, the question must be asked – what function is the SPD intended to fulfil and is it required at all? There are two potential answers. Either: 1. the draft SPD is intended to “*guide the determination of applications for planning permission*” (and, should, therefore, be progressed as a DPD) or 2. the SPD has no purpose and serves no function. As a result, the SPD should either be progressed and adopted as a DPD or abandoned. In either event, the SPD process should be stopped.

Appropriateness of copying content already contained in National Guidance and Policy

- 1.6 The policies of the SPD should be consistent with national policy and guidance.
- 1.7 The SPD repeats – sometimes word for word and sometimes paraphrases – the content of a significant amount of existing national policy and guidance. Given that national policy and guidance can be changed by the Government at any time (and, in the case of Guidance, often with no prior warning), the policy contained in the draft SPD risks becoming inconsistent with

policy and guidance as articulated at a national level. This is unhelpful would cause uncertainty for all users of the planning system.

- 1.8 There is no need for the SPD to restate existing national policy or guidance. This approach results in a lengthy document in which it is difficult to easily identify local policies. As a result the effectiveness of the document is undermined.
- 1.9 Further, in a number of cases where national policy or guidance has been paraphrased by the draft SPD, a different “gloss” or emphasis appears to have been given to the policy. Again, this is likely to cause confusion and is unhelpful.
- 1.10 Therefore, we would suggest that the SPD is limited to containing statements which assist with the interpretation of the policies of the local plan. The restatement of national policy and guidance should be deleted.

Comments on the detailed policies of the SPD

Typo - Para 2.26

- 1.11 In paragraph 2.26, there appears to be a word missing as per the below (the underlined wording in red is the missing word):

“Devon Home Choice produce a quarterly monitoring report providing information on the number of households registered on the scheme and applications received for social and affordable rented affordable housing, giving an indication of housing need”

Para 2.3 – Who Delivers New Affordable Housing

- 1.12 Paragraph 2.3 states:

“In most cases, new affordable homes to rent are constructed by private developers and sold to registered providers (RPs) at a discounted price.”

- 1.13 This is not strictly true. RPs pay the market value of the affordable homes. This market value will reflect the restrictions placed upon the affordable dwellings through planning obligations or conditions.
- 1.14 The price to be paid by RPs is not, therefore, “discounted”. It is the market value having regard to the restricted occupation of the properties. Using the term “discounted price” here is misleading and is likely to result in confusion. We would suggest this wording is deleted.

Para 2.15 and Para 4.6 – 10% for affordable home ownership

- 1.15 Para 2.15 states *“As part of the overall affordable housing contribution on major sites, at least 10% of homes should be available for affordable home ownership, subject to various exemptions (e.g. significantly prejudicing the ability to meet the needs of specific groups).”* This is repeated in paragraph 6.4.
- 1.16 We recognise that this statement is derived from paragraph 64 of the NPPF. However, paragraph 64 of the NPPF has, in our experience, caused some confusion for both LPAs and developers.

1.17 To avoid any confusion, we would suggest the following amendment:

“As part of the overall affordable housing contribution on major sites, at least 10% of the affordable homes should be available for affordable home ownership, subject to various exemptions (e.g. significantly prejudicing the ability to meet the needs of specific groups).”

Para 3.2 – Designated Rural Areas

1.18 Paragraph 3.2 states:

“3.2 This means that affordable housing will be sought from ‘major’ residential development i.e. where 10 or more homes will be provided, or the site has an area of 0.5 hectares or more. In ‘designated rural areas’ affordable housing can be sought from schemes of between 6 and 9 dwellings in the form of an off-site contribution, paid upon completion of the development, to the delivery of affordable housing elsewhere. The vast majority of East Devon is within a designated rural area, with only the parishes of Exmouth, Sidmouth, Seaton and Honiton excluded. These affordable housing thresholds are explained in figure 3.1 below.”

1.19 The table at figure 3.1 states that, in the DRAs, a contribution towards off site affordable housing will be sought for schemes which comprise between 6 and 9 dwellings.

1.20 The NPPG makes it clear that LPAs may choose to apply a lower threshold in DRA. It is not mandatory to set “more than 5 dwelling threshold” for the payment of an affordable housing contribution.

1.21 Nearly all of East Devon is covered by DRA designations. The designation was put in place in April 1981 (pursuant to SI 1981/397) and has not changed since. East Devon has been subject to a number of significant developments in the last 38 years. Therefore, the Council should critically assess whether some of the areas designated as DRAs in 1981 should be treated differently for the purposes of the policy regarding the provision of affordable housing.

1.22 The intention behind the “Small Sites Exemption” policy was to give a boost to small to medium size developers. In East Devon, it would be appropriate to allow the exemption to apply to a greater area of the District than the four parishes that fall outside of the DRA designation in order to support and invigorate the SME building sector.

Para 3.5 – Subdivision of Sites in relation to the Small Sites Exemption

1.23 Paragraph 3.5 relates to the application of the Small Sites Exemption in circumstances where it appears that a site has been artificially divided into smaller developments in order to avoid affordable housing. It states *“Similarly, proposals that artificially sub-divide sites within the same ownership or allocation will also be closely examined, so that the affordable housing threshold is not circumnavigated. In these circumstances, the council will consider the proposal as a single site for the purposes of the affordable housing threshold.”* (our underlining)

1.24 There are a number of situations in which land within the same ownership may be legitimately divided into smaller sites and/or developed at different times.

- 1.25 Therefore, whilst we agree that the Council should be careful to guide against abuse of the small sites exemption, the policy should not be drafted in mandatory terms (i.e. that the Council **will** consider the proposal as a single site). Instead, we would suggest that the Council's policy should state that these factors will be taken into account in assessing whether there has been an abuse of the council's affordable housing policies.

Para 3.11 Viability

- 1.26 Paragraph 3.11 states: *"The value paid for the land is often the biggest factor affecting the viability of a development. Viability appraisals will be expected to be based not the value paid for the site but based on the existing use value of the land plus a premium for the landowner, in determining the premium for the landowner regard will be had to the approach currently taken by Homes England in assessing funding bids which is a 20% uplift on the existing use value. Regard will also be had to other up to date evidence of land values including case law where the guidance on the NPPF 2018 and any subsequent amendments have been tested."*

- 1.27 There are a number of problems with this approach to viability testing. For example:

Viability Policies must be adopted through a DPD

- 1.27.1 As explained below, the approach to viability advocated by the SPD is not consistent with national policy or guidance.
- 1.27.2 Further to our comments in paragraph 1 of this Statement, any policies relating to viability testing can only be adopted through the DPD process (including the submission of the policies for public examination).
- 1.27.3 It would be unlawful to adopt policies which seek to direct or control the consideration of the viability of development as a SPD.

The Local Plan policies have not been viability tested in accordance with the NPPF 2018 or the NPPG.

- 1.27.4 As the NPPG makes clear, *"The role for viability assessment is primarily at the plan making stage. Viability assessment should not compromise sustainable development but should be used to ensure that policies are realistic, and that the total cumulative cost of all relevant policies will not undermine deliverability of the plan. It is the responsibility of plan makers in collaboration with the local community, developers and other stakeholders, to create realistic, deliverable policies. Drafting of plan policies should be iterative and informed by engagement with developers, landowners, and infrastructure and affordable housing providers."* NPPG Paragraph: 002 Reference ID: 10-002-20180724 (Revision date: 24 07 2018)
- 1.27.5 The examination and adoption East Devon Local Plan pre-dated this guidance. Therefore, the planning obligation requirements contained in the adopted Local Plan have not been subjected to the level of scrutiny now required to ensure that *"the planned types of sites and development to be deliverable, without the need for further viability assessment at the decision making stage"* (as required by the NPPG).

1.27.6 Given that:

- (a) Developers and landowners have not been party to the collaborative processes envisaged by the most recent versions of the NPPF and NPPG in order to ensure that the policies of the Local Plan can be delivered without the need for further viability assessment; and
- (b) The policy requirements have not been subjected to the detailed level of viability testing now required,

it is inappropriate to apply the viability guidance from the NPPF and the NPPG in this way.

1.27.7 Applying an inflexible approach to viability testing in this respect is likely to result in an increased number of unviable developments. Landowners will simply not release their land for development. As a result, the number of affordable dwellings (and general needs housing) that can be delivered will reduce.

The SPD does not accurately reflect the national approach to viability

1.27.8 Whilst the NPPG refers to the “EUV plus” method of determining benchmark land value, the Guidance also makes it clear that in determining the “premium” due to a landowner should be informed by evidence including market comparables. For example, the NPPG states:

“What factors should be considered to establish benchmark land value?”

Appendix 9 Benchmark land value should:

- *be based upon existing use value*
- *allow for a premium to landowners (including equity resulting from those building their own homes)*
- *reflect the implications of abnormal costs; site-specific infrastructure costs; and professional site fees and*
- *be informed by market evidence including current uses, costs and values wherever possible. Where recent market evidence is used to inform assessment of benchmark land value this evidence should be based on developments which are compliant with policies, including for affordable housing. Where this evidence is not available plan makers and applicants should identify and evidence any adjustments to reflect the cost of policy compliance. This is so that historic benchmark land values of non-policy compliant developments are not used to inflate values over time.” Paragraph: 014 Reference ID: 10-014-20180724 (Revision date: 24 07 2018) (our underlining)*

1.27.9 Therefore, adopting a strict “EUV plus” method does not reflect the NPPG. The NPPG is clear that evidence of market comparables on policy compliant schemes is a key component of determining benchmark land values.

1.27.10 The NPPG certainly does not support the use of a blanket percentage uplift to reflect the premium that should be paid to landowners.

There is no formal or informal policy statement which would support the EUV+ 20% approach being advocated by the Council

1.28 The draft SPD asserts that Homes England applies a “20% uplift on the existing use value” when assessing funding bids. However, no evidence has been provided to demonstrate that this is the case. Indeed, no reference has been added to the draft SPD to enable readers to understand the basis of this statement.

1.29 We are aware of one instance in which Homes England has applied a EUV plus 20% “rule of thumb”. However, this does not appear to have been applied by Homes England in the vast majority of other sites with which we are involved. There certainly does not appear to be a formal policy or practice adopted by Homes England (or any other body) which requires the application of a blanket percentage as an uplift on EUV when considering viability.

1.30 It is certainly the case that a blanket “EUV plus 20%” approach is unsupported by either the NPPF or the NPPG. The NPPG makes it clear that, when establishing what would be a reasonable premium to the landowner, plan makers should follow *“an iterative process informed by professional judgement”* which *“must be based upon the best available evidence informed by cross sector collaboration. For any viability assessment data sources to inform the establishment the landowner premium should include market evidence and can include benchmark land values from other viability assessments. Any data used should reasonably identify any adjustments necessary to reflect the cost of policy compliance (including for affordable housing), or differences in the quality of land, site scale, market performance of different building use types and reasonable expectations of local landowners.”* (See Paragraph: 016 Reference ID: 10-016-20180724 (Revision date: 24 07 2018))

1.31 The Council’s intended approach to assessing benchmark land value is wholly unsupported by evidence.

1.32 Therefore, the reference to Homes England adopting an approach of applying a “20% uplift on the existing use value” should be deleted.

EUV plus 20% will undermine the deliverability of the Local Plan

1.33 The NPPG defines the “EUV plus” approach as follows:

“To define land value for any viability assessment, a benchmark land value should be established on the basis of the existing use value (EUV) of the land, plus a premium for the landowner. The premium for the landowner should reflect the minimum return at which it is considered a reasonable landowner would be willing to sell their land. The premium should provide a reasonable incentive, in comparison with other options available, for the landowner

to sell land for development while allowing a sufficient contribution to comply with policy requirements.” (Paragraph: 013 Reference ID: 10-013-20180724 Revision date: 24 07 2018)

- 1.34 Therefore, it is essential to bear in mind that any premium must result in the landowner being willing to sell their land for development.
- 1.35 As a result, viability assessments must be realistic and not subject to artificial assumptions. In many rural areas EUV will be in the region of £10,000 per acre. An additional £2,000 per acre will not encourage any (other than the most desperate landowners) to part with their land. It would certainly not be sufficient to result in a “willing” landowner.
- 1.36 When rural and agricultural land has often been in a family for generations, a small uplift will not be enough to justify “selling off the family silver”. The sale of agricultural land also carries with it the loss of the right to continue farming that land and derive an income therefrom. Therefore, the premium also needs to reflect this opportunity cost. The premium also needs to reflect landowner’s reasonable aspirations.
- 1.37 “EUV plus 20%” does not, therefore, reflect reality. As noted above, there is no policy or evidential basis for this approach. For example, other “rules of thumb” have been applied when considering viability on a national basis. For example, the Letwin Review referred to “ten times existing use value”. Some viability experts promote a “rule of thumb” of equality. This means that, once EUV has been established, the uplift in land value as a result of the development (over and above EUV) should be shared equally between the owner and planning obligation costs. This should ensure fairness between the parties which would, in turn, increase the chances that any landowner would be “willing”.
- 1.38 However, in summary, it is clear is that there is currently no widely adopted “rule of thumb” for determining the landowner’s premium which represents the “plus” element of EUV plus.
- 1.39 Therefore, it would be inappropriate to apply a set percentage as a “rule of thumb” when assessing what might be a reasonable premium on a blanket basis.
- 1.40 Therefore, it is essential that the policy is amended to reflect the NPPG approach to viability which requires the premium to landowners to be assessed having regard to evidence of market comparables.

Suggested Wording for Para 3.11

- 1.41 We would suggest that paragraph 3.11 should be deleted and replaced with the following wording:

“Viability appraisals will be expected to follow the approach advocated in national policy and guidance and be supported by appropriate evidence.”

3.14 and 3.15 – Overage Provisions

- 1.42 The SPD refers to the imposition of overage provisions in mandatory terms. However, as demonstrated in appeal ref APP/U1105/W/16/3165906, the blanket imposition of such provisions has not been supported. Therefore, the policy should be amended to reflect the fact that the overage provisions may not be reasonable or appropriate in all cases.

- 1.43 Viability Review provisions should only be applied in the case of multi-phase developments where there is likely to be considerable delay between the completion of the planning obligations and the development of later phases. Otherwise, such provisions impose a considerable additional administrative and cost burden on SME developers by requiring the production of additional viability evidence as the development progresses. This is contrary to the spirit of national planning policy and guidance. It also runs contrary to the “direction of travel” of policy.
- 1.44 The NPPG makes it clear that any policies regarding Viability Review provisions should be set out at a local plan level. It is not appropriate to seek to include these policies in the SPD for the reasons set out above.

Affordable Housing in developments for Older Persons/Sheltered Housing

- 1.45 The SPD anticipates that affordable housing should be provided on site in connection with developments for older people or sheltered housing schemes in accordance with the standard requirements. This is unlikely to be practical in most cases.
- 1.46 Housing for older people and sheltered housing often includes the provision of property management and other services which are paid for by the residents. Such service charges may not be compatible with delivering on-site affordable housing.
- 1.47 Further, the affordable housing will usually be transferred to and managed by a RP. These types of development are usually best managed as a whole so as to prevent a division on the site between those who have access to certain services and those who do not. Therefore, we would suggest that recognition that off-site affordable housing may be more appropriate in such schemes should be included in the SPD.

Paras 5.6 and 5.7 – Pepperpotting and Clusters

- 1.48 Para 5.6 states *“Pepper potting or dispersal of affordable housing can take place in clusters, which are defined as groups of dwellings that have adjacent side boundaries, share the same road frontage, and are located directly opposite each other.”*
- 1.49 Defining a cluster as being dwellings which “share the same road frontage” is likely to cause problems in practice. Roads can be relatively long and frontagers can be located some distance away from each other. In some cases, a development will only have one road frontage. Therefore, “clusters” should be defined as being dwellings which are immediately adjacent to each other.
- 1.50 Para 5.7 states *“Affordable housing should generally be provided in clusters of no more than 10 dwellings, unless the applicant can justify that greater than 10 dwellings is necessary, and can still be delivered in a manner that promotes social cohesion and creates a mixed and balanced community. On larger sites it is likely that clusters will be up to 10 dwellings; whilst on smaller scale sites, clusters should be commensurately smaller. The affordable housing within each cluster should include a mix of tenures.”*
- 1.51 Specifying cluster sizes undermines the flexibility needed to enable the best design of the scheme. The desire to socially engineer sites should not come before the planning imperative

to deliver high quality places in which people wish to live. Place making benefits all residents of a scheme (whether affordable or open market). Therefore, the perceived social benefits of peppercotting should not be allowed to prejudice the actual benefits of creating high quality developments.

- 1.52 Further, the reason for clustering units must be borne in mind. It is often easier and more effective for RPs to manage clusters of Affordable Housing units. It is far more difficult to manage pepper-potted units. Therefore, on larger sites, clusters of 10 units are likely to be too small.
- 1.53 Para 5.9 states: “*Nevertheless, affordable housing on exception sites should still be dispersed where physically possible*”. This is unrealistic (for property management reasons) and is unlikely to be achievable in practice. On these small sites with a high percentage of affordable housing, it is likely that the affordable housing will probably fall within one cluster.

Paragraph 5.11 - Space Standards

- 1.54 Paragraph 5.11 states “*National policy allows the use of a minimum internal space standard for new dwellings, where a need can be justified. There are no space standards in the East Devon Local Plan 2013-2031, but dwelling size is seen as an important issue for design quality, and to avoid overcrowding in affordable homes.*” (our underlining)
- 1.55 The underlined wording introduces uncertainty and should be deleted.
- 1.56 It would be unlawful to adopt policies which seek to introduce space standards (whether directly or indirectly) through a SPD. Any such policies would need to be adopted by following the DPD process.

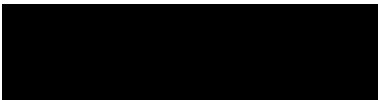
Appendix 3 - Standard s.106 Agreement for Affordable Housing

- 1.57 There are number of problems with the draft provisions appended to the SPD at Appendix 3. The most significant of these problems would prevent RPs from being able to charge the units. This would, therefore, mean that the Affordable Housing units would not be deliverable without a Deed of Variation being entered into to correct these problems. This, in turn, would result in additional cost and delay for all parties.
- 1.58 It is, in short, very counter productive to adopt overly restrictive affordable housing provisions that do not reflect the realities of how affordable housing is delivered by RPs. Therefore, the wording must be amended to ensure that the affordable housing units can be charged by RPs.
- 1.59 Further, it must be borne in mind that the planning obligations are subject to the tests of R122 of the CIL Regulations. This means that they must not go beyond what is:
- 1.59.1 necessary to make the development acceptable in planning terms
 - 1.59.2 directly related to the development; and
 - 1.59.3 fairly and reasonably related in scale and kind to the development.

- 1.60 It is, therefore, unlawful for the planning obligations to go beyond what is necessary. There are a number of aspects of the draft which breach this principle. For example, it is not necessary to duplicate any controls on the development that already exist through the planning system (e.g. requiring compliance with plans) or through existing statutory regimes (e.g. requiring additional restrictions on title when s.106 obligations already run with the land).
- 1.61 The negotiation of planning obligations can significantly delay the grant of planning permission and the delivery of development. Therefore, the standard draft should be as concise and as user-friendly as possible. There is no point in having overly complicated provisions that will have to be renegotiated for each development. This would simply delay the delivery of urgently needed general needs and affordable housing (and adversely affect the delivery of the Local Plan).
- 1.62 Further, the planning obligations should also seek to avoid unnecessary restrictions on the commencement of development. There is a national policy imperative to accelerate rather than slow the delivery of development once planning permission has been granted. Preventing the commencement of any development on site until the Affordable Housing Scheme has been submitted to and approved by the Council is unnecessary. There is no reason why the development should not commence (e.g. through the carrying out of site preparation works, the construction of infrastructure etc) until a scheme setting out the detail of the Affordable Housing Units (much of which will have already been dealt with through the planning process – e.g. layout, size, location of the units) has been submitted and approved.
- 1.63 We have been through the draft s.106 wording in detail and have marked up the draft with our suggested amendments and comments. The marked up draft wording is appended hereto at Appendix 1.

Yours faithfully

Clarke Willmott LLP



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Appendix 1 to Clarke Willmott Representations on EDDC Affordable Housing SPD

Comments on draft Affordable Housing Provisions

Part A: Affordable Housing Provisions

The Owner hereby covenants with the District Council as follows:-

1. Definitions

For the purposes of this Schedule the following words will have the following meanings:

"Affordable Housing"	Means (subject to the provisions of this Agreement) units of subsidised housing within the meaning of National Planning Policy Framework or any Government Policy Statement or Circular that replaces it
"Affordable Housing Provider" or "AHP"	means a housing association or similar organisation or a social landlord in each such case registered with the Housing Corporation under Section 1 of the Housing Act 1996 or such other body or organisation whose main object is the provision of Affordable Housing as agreed by the District Council
"Affordable Rent"	means a rent of up to 80% of local market rent to include the service charge (where applicable) and in any event should not exceed the published Local Housing Allowance for the relevant property type and in the relevant market area
"Affordable Rented Dwelling"	means a Dwelling available to those whose needs are not adequately served by the commercial housing market let at an Affordable Rent and which complies with the definition of affordable rented housing in Annex 2 of the National Planning Policy Framework
"Affordable Shared Ownership Dwelling"	means a Dwelling for sale on a shared ownership basis solely by way of a Shared Ownership Lease
"Affordable Housing Units"	means the XX Dwellings to be provided as Affordable Housing comprising X Affordable Shared Ownership Dwellings and XX Affordable Rented Dwellings to be provided in accordance with the provisions of this Schedule on the Affordable Housing Site
"Affordable"	means the scheme for securing the provision of the Affordable

Housing Scheme”	<p>Housing Units on the Affordable Housing Site as hereinafter defined more particularly;</p> <ul style="list-style-type: none"> - the location of, -mix of unit types - name of proposed <u>Registered Provider</u>AHP - details of the proposed unit size <u>and applicable Design and Quality Standard</u> - proposed tenure for those units; and - the proposed timetable for such provision
“Affordable Housing Site”	<p>means the land to accommodate the Affordable Housing Units including curtilage as shown within the land shown edged [yellow] on the Plan annexed hereto</p>
“Chargee”	<p><u>any mortgagee or chargee or any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (reach a Receiver) of any of the Affordable Housing Units or any persons or bodies deriving title through such mortgagee or chargee or Receiver</u></p>
“Design and Quality Standards”	<p>Means that the Affordable Housing Units shall be constructed;</p> <ul style="list-style-type: none"> (i) strictly in accordance with the plans and elevations deposited and as approved by the District Council as part of the Planning Permission (i) to meet part M4(2) of the Building Regulations Category 2: accessible and adaptable dwellings (or any comparable updated nationally set standards) (ii) <u>(in so far as the Affordable Housing Units will be funded through grant or public subsidy) in accordance with Homes England’s design and quality standards and the Affordable Housing Provider’s own design standards</u> applicable at the time of <u>Commencement of Development</u>the grant of the Planning Permission (iii) Tenure blind so as to be <u>materially</u> indistinguishable

Comment [CW1]: As per my comments below – does it add anything to refer to the AH Site here?

Comment [CW2]: As the wording requires all AH Units to be built to the Design Standard, this should not be a matter for subsequent submission and approval

Comment [CW3]: In most cases, you will not be able to defined the AH Site with reference to a plan. In outline schemes, this will not be known and will be subject to later approvals. Even in detailed schemes, the area to be acquired by the AHP may be subject to negotiation (e.g. some AHPs prefer to acquire associated communal areas whereas some just want the dwellings and their curtilages). Also, do you need this definition? What does it add?

Comment [CW4]: This is the generally accepted industry standard for the definition of Mortgagees/Chargees. It is important to get this right. Failure to do so will prevent the delivery of affordable housing due to the lack of availability of funding.

Comment [CW5]: It would be better to call this “Design Standards” - otherwise, there could be some confusion with the old DQS

Comment [CW6]: This is unnecessary – if the dwellings aren’t built in accordance with the plans, this is a matter for planning enforcement – not the s.106.

Comment [CW7]: The first point here is that the DQS should only apply to dwellings which benefit from grant funding. Otherwise, compliance with M4(2) of the Build Regs (as per Local Plan policy) is sufficient. The second point is whether this meets the tests of R122 of the CL Regs: Is it necessary? If compliance with a standard is required by Home England, this will be dealt with through negotiations with the AHP. Third, as regards building to the AHP’s standards, this will form part of the private law negotiations between the AHP and the Developer. Usually, the AHP has quite a bit of input in this respect – especially where they { ... [1]

	from Private Dwellings <u>in respect of their external appearance</u>
“Designated Person”	Means a person <u>or family</u> who is registered with Devon Home Choice or Help to Buy South West and is in Housing Need
“District”	means the administrative area of the East Devon District Council
“Devon Home Choice”	means a choice based lettings scheme developed and operated in partnership between the District Council and the <u>Registered Provider AHP</u> or any successor scheme or arrangement agreed <u>between the Council and the AHP</u> as a replacement for Devon Home Choice
<u>“Help to Buy South West”</u>	Means the Government appointed local help to buy agency which provides a one stop shop for households seeking all forms of local cost home ownership
“Housing Need”	Means being homeless or threatened with homelessness or living in accommodation which in the opinion of the District Council is Insecure or unsuitable and being unable to purchase or rent reasonably suitable accommodation in the open market for property in the locality where the Affordable Housing Unit is situated taking into account the person’s income and capital and other financial circumstances. Accommodation may be unsuitable on the grounds of cost, overcrowding, unfitness or lack of basic amenities or because of a person’s infirmity, physical disability, mental disability or specific social or care needs
“Insecure”	means accommodation which the Designated Person does not have a legal right to occupy in the long term
<u>“Lettings Notice”</u>	Means a notice (the content of which is to be agreed with the District Council) which contains details of the property to be let and which shall include unless otherwise agreed with the District Council <ul style="list-style-type: none"> a) The name and address of the landlord and the Owner b) The postal address of the property c) The amount of the <u>w</u>weekly or monthly rent (not to

Comment [CW8]: “family” would need to be defined. Usually, the term Household (meaning all people who can reasonably be expected to reside with the person) is used in this respect.
“Family” is quite a loaded term.

	<p>exceed the Affordable Rent)</p> <ul style="list-style-type: none"> d) Amount and breakdown of any service charge per week/month/annum e) Details of any additional charges f) Any age or other occupancy restrictions g) Property type h) Property size i) Heating type j) Details of mains services in the property k) Availability of parking space/garage l) Any disabled adaptations m) Provision of any support services <p>And which is delivered to the District Council clearly addressed and marked for the attention of Housing Enabling and Allocations Manager PROVIDED THAT for the avoidance of doubt an advertisement for the Affordable Rented dwelling placed on Devon Home Choice and approved by the District Council shall be considered a Letting Notice for the purpose of paragraph ##### of schedule 1</p>
<p>“Local Connection”</p>	<p>means a connection to the Parish of ##### demonstrated by one or more of the following in priority order:</p> <ul style="list-style-type: none"> (1) being permanently resident therein for a continuous period of at least six (6) months out of the last twelve (12) months immediately prior to being offered the Affordable Housing Unit; or (2) being formerly permanently resident therein for a continuous period of five (5) years; or (3) having his or her place of permanent work (normally regarded as 16 hours or more a week and not including seasonal employment) therein and in the case of where the Affordable Housing Unit is within a village, small town and outside a built up area boundary as set out in the East Devon Local Plan, has also been in permanent employment for a continuous period of at least twelve (12) months immediately prior to being offered the Affordable Housing Unit; or (4) having a connection through a close family member (normally mother, father, brother, sister, son or daughter) where the

Comment [CW9]: I am not sure that I understand this. If the AH Unit is in a rural area, it is unlikely that the person would have employment within the relevant Parish – let alone having been employed there for at least 12 months. Why are people treated differently in rural and urban areas?

	<p>family member is currently resident therein and has been so for a continuous period of at least five (5) years immediately prior to being offered the Affordable Housing Unit and <u>in the case where the Affordable Housing Unit is within a village, small town and outside a built up area boundary as set out in the East Devon Local Plan, there is independent evidence that the family member is in need of support or can give support;</u> or</p> <p>(5) such person as is prescribed by the Allocation of Housing (Qualification Criteria for Right to Move) (England) Regulations 2015</p> <p>and in the event that no-one satisfying the above requirements can be found within the Parish of XXXXXXX then the process shall be repeated considering persons from the following areas in the following priority order;</p> <p>(1) the Neighbouring Parishes,</p> <p>(2) persons from the District</p> <p><u>(3) persons from the administrative area of the city of Exeter with prior written approval of the District Council</u></p> <p><u>(4) persons from the County</u></p> <p><u>(3)</u></p>
Local Housing Allowance	means the flat rate rental allowance providing financial assistance towards the housing costs of low income households for different rental market areas and property types set out and reviewed by the valuation office agency under a framework introduced by the Department of Works and Pensions or such similar framework that may replace it.
“Neighbouring Parishes”	means the parishes of XXXXXX ,
Open Market Rent	Means the rent at which the premises might reasonably be expected to let at, in the open market, at the review date, <u>on reasonable terms disregarding the provisions of this Agreement</u> on the terms of the lease.
Affordable Home Ownership	Means (subject to the provisions of this Agreement) <u>units of subsidised housing for sale within the meaning of “Other</u>

Comment [CW10]: Again, why are people treated differently in rural areas?
 If the Affordable Housing Unit is in a rural area, it is likely that the Neighbouring Parishes will also be rural. This mean that people from rural areas are being discriminated against – making it less likely that local rural needs will be met by affordable housing.

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	Affordable Routes to Home Ownership” within the National Planning Policy Framework or any Government Policy Statement or Circular that replaces it
“Scheme of Advertising”	<p>means the advertising for sale or letting of any interest in the relevant Affordable Housing Units in accordance with a scheme to be approved in writing by the District Council (such approval not to be unreasonably withheld or delayed) which scheme shall include unless otherwise agreed with the District Council</p> <ul style="list-style-type: none"> a) in the case of Affordable Rented Dwellings an advertisement on the website of Devon Home Choice or such other similar website for advertising of Affordable Housing Units as agreed by the District Council; or b) in the case of the Shared Ownership Dwellings and Affordable Home Ownership Units an advertisement on the website of Help to Buy South West being the Government appointed help to buy agent for Devon or other successor organisation c) in the case of Affordable Home Ownership Units an advertisement on a prior approve relevant website as agreed by the District Council
“Shared Ownership Lease”	means a long shared ownership lease (as defined in section 622 of the Housing Act 1985 or successor provision) with an Affordable Housing Provider substantially in accordance with Homes England (or successor body) Model as at the date of any such lease where the purchaser purchases an initial share of the equity between 25 – 80% and pays rent on the remaining unsold equity [and where additional share of the equity can be purchased provided that no more than 80% of the equity can be purchased] [DPA areas only]
“Staircasing Receipts”	Means any monies received by the approved Affordable Housing Provider of an Affordable Shared Ownership Dwelling as a result of the leaseholder exercising a right to increase their share of the equity <u>less the amount of any outstanding loan amount secured on the Affordable Shared Ownership Dwelling and the reasonable costs of administration or legal or other expenses</u> (and any part of

Comment [CW11]: Needs to be moved to alphabetical order

Comment [CW12]: The AHP can only be required to recycle net receipts. It cannot be required to recycle more than it has received.

such monies)

2. Affordable Housing Provision

- 2.1 Not to ~~carry out or otherwise cause or~~ permit the ~~Commencement of Development~~ construction of any Dwelling - unless and until the Affordable Housing Scheme has been submitted to and approved in writing by the District Council
- 2.2 To construct and provide the Affordable Housing Units in accordance with the ~~approved~~ Affordable Housing Scheme ~~approved pursuant to paragraph 2.1 above~~ and in accordance with the Design ~~and Quality~~ Standards
- 2.3 ~~No more than 75% of the Private Dwellings comprised in a Phase shall be Occupied unless or until the all of the Affordable Housing Units within that Phase have been completed and are available for Occupation. Notwithstanding the requirements of paragraphs 2.1 and 2.2 above to have transferred the freehold interest or leasehold (of a minimum period of 80 years) interest in the Affordable Housing Site to the Affordable Housing Provider and to have completed all of the Affordable Housing Units prior to the Occupation of the [Thirteenth (13th)] Private Dwelling and not to permit Occupation of the [Thirteenth (13th)] Private Dwelling until such transfer has occurred and all of the Affordable Housing Units have been completed and are available for Occupation~~
- ~~2.4 The Affordable Housing Units shall only be used for the purpose of providing Affordable Housing and shall be so used in perpetuity (here meaning for a minimum period of 80 years)~~
- 2.5 The transfer of the Affordable Housing Site and / or the Affordable Housing Units to the Affordable Housing Provider shall be in such form as the Owners shall reasonably require to ensure that the Affordable Housing Site and / or the Affordable Housing Units are subject to ~~substantially~~ the same rights and easements and covenants (both restrictive and positive) as are to be granted and reserved in sales of the Private Dwellings
- 2.6 ~~To ensure that the Affordable Housing Site and / or Affordable Housing Units together with their respective curtilages will abut a publicly adopted highway or roads and footways the subject of a bonded road making agreement under section 38 of~~

Comment [CW13]: Commencement is a bit early for the approval of the AH Scheme – there is no reason access and site prep works should not be carried out while the AH Scheme is being agreed

Comment [CW14]: I have amended this wording so that people do not have to worry about checking cross referencing in due course.

Comment [SS15]: Prior to 75% occupations consider early in the process before instructions

Comment [CW16]: I have changed this to the negative. I have also referred to a % rather than an absolute figure to cater for the fact that many applications will be in outline only and will not have a fixed number of dwellings when the s.106 is signed. I have also removed the need to transfer the AH Site to the AHP. This is because in respect of any low cost home ownership products, the site may not be transferred to an AHP. Also, having completed AH Units will have a massive holding cost for any developer, it is very much in their interest to transfer to an AHP as soon as possible in order to recoup some of the cost. Given that planning is about land use not land ownership, as long as the AH units have been built and are ready for occupation – this is sufficient to make the development acceptable in planning terms. Therefore, requiring anything further would fail the tests of R122 of the CIL Regs.

Comment [CW17]: This duplicates para 3.1 below

the Highways Act 1980 (or enjoy ready and free access thereto via an intervening private drive) and have ready and free access to all usual domestic services needed for residential occupation of such Affordable Housing Units ~~without the Affordable Housing Provider having to make any payment either to the Owner or any third party for any right of way or right to use such services or connect to them~~

2.7 ~~The transfer of the Affordable Housing Site and the Affordable Housing Units to the Affordable Housing Provider will contain a declaration that the Affordable Housing Site is so transferred subject to and with the benefit of the terms of this Agreement~~

2.8 At least 10 Working Days prior to Occupation of 75% of the the [Thirteenth (13th)] Private Dwellings to serve on the District Council a Trigger Point Notice to notify the Council of the intended date of Occupation of 75% of the [####(##)] Private Dwellings

2.9 ~~At least one month to the date when the Affordable Housing Units (or any of them) shall be available for Occupation to serve on the District Council a~~ The Owner shall provide the Council with at least one month's prior written notice ~~Trigger Point Notice of the anticipated to notify~~ date on which the Affordable Housing Units shall be available for Occupation.

3. Restrictions on Occupation of Affordable Housing Units

3.1 Subject to the provisions of this Deed, the Owners ~~and/or Affordable Housing Provider~~ as appropriate shall not at any time permit the Affordable Housing Units to be occupied other than as Affordable Housing by a Designated Person (and their dependents) who has a Local Connection

Affordable Rented Dwellings

4.1 Not to permit or otherwise allow any of the Affordable Rented Dwellings to be let other than:

~~4.1.1 To a Designated Person~~

4.1.2 At a sum not exceeding the Affordable Rent; and

4.1.3 To persons selected in accordance with the principles of the Devon Home Choice policy whether or not the Affordable Housing Provider is a member of the Devon Home Choice scheme

Comment [CW18]: Do we need these provisions – we act for AHPs and they are wholly capable of ensuring that the dwellings they acquire have the benefit of access and services. Above, we have said that the AH Units have to be complete and ready for occupation before more than 75% of the Private Dwellings can be Occupied. “Ready for Occupation” would include the need for the dwellings to be accessible and connected to services. A dwelling which is uninhabitable (e.g. with no water, foul drainage, electricity) is not ready for occupation.

Comment [CW19]: This is likely to be difficult. The cost of connecting to services will either be accounted for in the value of the AH Units sold to the AHP or the AHP may pay connection charges to the utility provider direct. Also, the AHP will have to pay for the use of utilities. Therefore, this wording will not work.

Comment [CW20]: This Agreement runs with the land – we do not need to say that it applies in any transfer.

Comment [CW21]: This wording is necessary to reflect the release provisions.

Comment [CW22]: The AHP will be the “Owner” for the purposes of the AH units once they acquire title thereto.

Comment [CW23]: This is already secured by para 3.1 above

Comment [CW24]: How does this work with the requirement in 3.1 that the person must have a Local Connection? Should the Affordable Rent Units be disposed of to a person selected in accordance with the principles of Devon Home Choice or selected in accordance with the Local Connection cascade? It cannot be both. The Council must decide which approach it favours.

- 4.2 Not to permit or otherwise allow any of the Affordable Rented Dwellings to be let on initial or subsequent letting prior to the submission to and approval by the District Council of a Scheme of Advertising for the Affordable Rented Dwellings
- 4.3 To serve upon the District Council a Letting Notice each time an Affordable Rented Dwelling becomes available for letting
- 4.4 To advertise the relevant Affordable Rented Dwelling in accordance with the Scheme of Advertising approved in accordance with paragraph 4.2 of this First Schedule immediately following the service of a Letting Notice in accordance with paragraph 4.3 of this First Schedule
- 4.5 Not to grant a tenancy of the relevant Affordable Rented Dwelling until the Owner ~~or Affordable Housing Provider~~ has submitted written verification to the District Council that the prospective tenant satisfies the obligations contained in this Deed and the District Council has given its approval that the prospective tenant would satisfy the obligations contained in the Deed (such approval not to be unreasonably withheld) and if no response is given by the District Council within 10 Working Days of receipt of written verification from the Affordable Housing Provider then approval will be deemed to have been given PROVIDED THAT such written verification is served upon the District Council clearly addressed and marked for the urgent attention of the Housing Enabling and Allocations Manager
- 4.6 The Affordable Housing Provider shall if so required by the District Council provide to the District Council (together with the written verification detailed in paragraph 4.2 above) all necessary documentation as stipulated in Annex 2 as evidence that the prospective tenant satisfies the obligations contained in this Deed.

Comment [CW25]: AHP will be “the Owner” for the purposes of the AH units

Affordable Home Ownership

- 5.1 Not to ~~cause or~~ permit ~~or otherwise allow~~ any of the Affordable Home Ownership Units to be sold or let other than :
- 5.1.1 by way of a Shared Ownership Lease; or
- 5.1.2 by way of another Affordable Home Ownership product which shall be agreed in writing with the District Council and
- 5.1.3 to a Designated Person who is either releasing an Affordable Housing Unit elsewhere in the District or is in Housing Need

5.2 ~~Unless otherwise agreed by the Council, Not~~ to permit or otherwise allow any of the Affordable Home Ownership Units to be sold or let on initial or subsequent sale or letting prior to:

Comment [CW26]: There may be circumstances in which the Council is aware of a person to be allocated to such a home in advance of advertising. There should be flexibility to accommodate such a person before the Scheme of Advertising has been approved and implemented.

5.2.1 the submission to and subsequent approval by the District Council of a Scheme of Advertising for the Affordable Home Ownership Units; and

5.2.2 advertising the relevant Affordable Home Ownership Units in accordance with the approved Scheme of Advertising at 5.2.1 above

5.3 In the event that the ~~Affordable Housing Provider or the Owner of an Affordable Home Ownership Units~~ is unable to sell ~~the an Affordable Home Ownership Units~~ in accordance with paragraph 5.1.3 above within a period of 60 Working Days of advertising the ~~relevant Affordable Home Ownership Units~~ may be ~~sold or rented to any willing purchaser by way of:~~

5.3.1 ~~an Intermediate Rent being let to any person at~~ 80% of the Open Market Rent

5.3.2 ~~sold or let to any willing purchaser by way of~~ an Alternative Affordable Housing product ~~that~~ shall have ~~first~~ been approved in writing by the District Council (such approval not to be unreasonably withheld or delayed) ~~and such person shall remain bound by the terms of this Deed~~

Comment [CW27]: This doesn't work – because it is unclear which provisions would apply. The "Alternative Affordable Housing product" would set out the controls for subsequent disposals. Before approving the product in writing – the Council should ask the owner to enter into formal arrangements to control the future occupation of that dwelling.

5.4 Not to exchange or complete contracts for the sale of any interest in the relevant ~~Affordable Home Ownership Units~~ until the Owner has submitted written verification to the District Council that the prospective purchaser satisfies the ~~obligation criteria~~ contained in this Deed and the District Council has given its approval that the prospective purchaser satisfies the obligations (such approval not to be unreasonably withheld) and if no response is given by the District Council within 10 Working Days of receipt of written verification from the Affordable Housing Provider then approval will be deemed to have been given PROVIDED THAT such written verification is served upon the District Council clearly addressed and marked for the urgent attention of the Housing Enabling and Allocations Manager

5.5 The Affordable Housing Provider or Owner of the Affordable Home Ownership Units shall if so required by the District Council provide to the District Council (together with the written verification detailed in paragraph 5.4 above) all necessary

documentation as stipulated in Annex 2 as evidence that the prospective purchaser satisfies the obligations contained in this Deed.

6 Release

6.1 None of the obligations and restrictions referred to in Part A of this Schedule will be enforceable in respect of any ~~mortgagee or cChargee or any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (reach a Receiver) of the whole or any part of the Affordable Housing Site or any persons or bodies deriving title through such mortgagee or chargee or Reciever~~ PROVIDED ALWAYS that the ~~mortgagee or cChargee or Receiver~~ has complied with its obligations contained in paragraphs 6.2 below

6.2 The ~~mortgagee or cChargee or Reciever~~ shall prior to seeking to dispose of the Affordable Housing Site or any Affordable Housing Unit(s) pursuant to any default under the terms of its mortgage or charge shall give not less than three months prior notice in writing to the District Council of its intention to dispose and;

(i) In the event that the District Council responds within three months from receipt of the notice indicating that arrangements for the transfer of the Affordable Housing Site or Affordable Housing Unit(s) can be made in such a way as to safeguard them as Affordable Housing for a consideration not less than the amount due and outstanding under the terms of the relevant security documentation including all accrued principal monies, interest and costs and expenses then the ~~mortgagee or cChargee or Reciever~~ shall cooperate with such arrangements and use its reasonable endeavours to secure complete such a transfer

(ii) If the District Council or any other person cannot within three months of the date of service of its response under paragraph 6.2 (i) secure complete such transfer then provided that the ~~mortgagee or cChargee or Reciever~~ shall have complied with its obligations under paragraph 6.2 the mortgagee or chargee or Reciever shall be entitled to dispose of the Affordable Housing Site or Affordable Housing Unit(s) free of the restriction

Comment [CW28]: The time periods are set out below. The reference to 3 months notice here can cause some confusion (e.g. is the 3 month notice in addition to the time periods below).

Comment [CW29]: Chargees require the word "complete" rather than "secure". "secure" does not have a legal meaning.

set out in this First Schedule which provisions shall (in relation to the relevant Affordable Housing Unit(s)) cease and determine absolutely

PROVIDED THAT at all times the rights and obligations in paragraph 6.2 shall not require the ~~mortgagee or chargee or Reciever~~Chargee to act contrary to its duties under the charge or mortgage and that the District Council must give full consideration to protecting the interests of the ~~mortgagee or chargee or Reciever~~Chargee in respect of monies outstanding under the charge or mortgage

6.3 In relation to any Affordable Housing Units the Affordable Housing obligations in this Deed shall not apply to;

6.3.1 any sale to a tenant in exercising their right to acquire or purchase under a statutory power or a tenant who acquires the said rented dwelling pursuant to any voluntary sales policy of its landlord or to the successors in title to any such persons to the intent that such provisions shall determine absolutely in respect of that unit

6.3.2 in relation to any Affordable Shared Ownership Dwelling where if required, the owner of the said unit has been granted a waiver to the requirements of the Designated Protected Area Order (SI 2009/2098) (or such other regulations restricting the ability to achieve 100% staircasing) the owner subsequently acquires such percentage that will take their ownership to 100% of the said unit or to the successors in title to any such persons to the intent that such provisions shall determine absolutely in respect of that unit

6.4 In the event of any Affordable Shared Ownership Dwelling being released from the Affordable Housing restrictions herein contained by virtue of the operation of paragraph 6.3.2 above the Owner shall provide the District Council with details of Staircasing Receipts from the Affordable Shared Ownership Dwellings and in co-operation with the District Council ~~reach agreement~~ to invest 100% of the Staircasing Receipts, if any, arising from the Affordable Shared Ownership Dwellings in the provision of new build Affordable Housing or to invest in measures to enhance the provision of Affordable Housing within the administrative area of the District Council including facilitating the acquisition of market housing or the conversion or refurbishment of existing housing to bring such housing back into beneficial use to enable it to be occupied provided that the use of the Staircasing Receipts is limited to the provision within District

7. Provision of Information

- 7.1 The Affordable Housing Provider will on request from the District Council allow the District Council to inspect or provide to the District Council such information as is necessary in order to enable the District Council to verify that the Affordable Housing Provider has sold or let of the Affordable Housing in accordance with the terms of this Schedule

The first point here is that the DQS should only apply to dwellings which benefit from grant funding. Otherwise, compliance with M4(2) of the Build Regs (as per Local Plan policy) is sufficient.

The second point is whether this meets the tests of R122 of the CIL Regs: Is it necessary?

If compliance with a standard is required by Home England, this will be dealt with through negotiations with the AHP.

Third, as regards building to the AHP's standards, this will form part of the private law negotiations between the AHP and the Developer. Usually, the AHP has quite a bit of input in this respect – especially where they are acquiring on a "design and build" basis.

Finally, the standard to which the AH should be constructed should be fixed when planning permission is granted. Otherwise, this may lead to a conflict between what is permitted by the planning permission and what is required by thes.106.