

## Decision under Delegated Powers

### Officer Requesting Decision

Head of Planning and Regeneration

### Officer Making the Decision

Head of Strategic Support

### Recommendation

That a Deed of Variation (Section 106 Linking Agreement) be agreed to the Principal Agreement dated 20<sup>th</sup> September 2011, as amended by the Supplemental Agreement dated 22<sup>nd</sup> December 2011, in relation to planning application P/10/1155/2, and planning application P/11/2179/2, for a residential development at Land off Barkby Road, Syston.

### Reason

The Deed of Variation seeks to vary an existing Section 106 Agreement in relation to:

- The insertion of a new clause 35.2.3 to the Section 106 Agreement. This amendment is sought to address concerns raised by the Affordable Housing Provider (Midland Heart Limited) in connection with an existing Clause 35.2.1 in respect of the affordable housing obligations being applicable to mortgagees and chargees.

### Authority for Decision

A variation of a Section 106 Agreement can be made under the delegated authority of the Head of Strategic Support.

### Decision and Date

## Background

Full Planning permission (reference P/10/1155/2) was granted for a residential development of 41 dwellings at Land off Barkby Road, Syston on 20<sup>th</sup> September 2011. The approved scheme includes associated works including the formation of accesses, internal highway works, provision of public open space and landscaping. This was subject to a Section 106 Agreement (Principal Agreement) dated 20<sup>th</sup> September 2011 relating to a variety of contributions towards the provision of education, healthcare, libraries, civic amenity, public transport, open space and affordable housing.

The Principal Agreement has been amended by the Supplemental Agreement dated 22<sup>nd</sup> December 2011, following the grant of Full Planning Permission (reference P/11/2179/2) in connection with a revised development scheme.

This latest Deed of Variation relates to the insertion of a new Clause 35.2.3 to the Section 106 Agreement.

The proposed Clause 35.2.3 states:

*“Clause 35.2 in this Agreement shall not be binding on a mortgagee or chargee (or any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (each a Receiver)) of the whole or any part of the Affordable Dwellings or any persons or bodies deriving title through such mortgagee or chargee or Receiver.”*

This amendment is sought to address concerns raised by the Affordable Housing Provider (Midland Heart Limited) in respect of an existing Clause 35.2.1 in connection with the affordable housing obligations being applicable to mortgagees and chargees.

The effect of the modification for the Affordable Housing Provider is that it shall provide the Provider with a wider selection of lenders which they can approach for funding and subsequently this will ensure that when they are in a position whereby they need to charge the Property, these will be given an open market value by an independent firm of valuers whereas at present the Property is being restricted to Existing Use Value for Social Housing (EUV-SH) which has a significant impact on the values that can be derived from the units.

The purpose of the variations are to bring the Agreement in line with the current requirements of lenders and funders when such properties are used as security for refinancing purposes. Without the required variations, the value of the applicable properties will be restricted to EUV-SH which can be up to 70% less than the market value of the applicable properties. The provisions are onerous and unreasonable as the effect is that it places the Affordable Housing Provider at a disadvantage and hinders their financial standing as well as their ability to provide new homes.

The agreed level of affordable housing contribution, at 30%, to be secured on-site, will still be delivered.

### **Financial Implications**

None

### **Risk Management**

No specific risks have been identified.

Key Decision:

Background Papers:

P/10/1155/2 - Planning file and Principal Section 106 Agreement

P/11/2179/2 - Planning file and Supplemental Agreement

## Appendix

**DATED** \_\_\_\_\_ **2020**

(1) **CHARNWOOD BOROUGH COUNCIL**

AND

(2) **MIDLAND HEART LIMITED**

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### **DEED OF VARIATION**

Relating to land to the North of Barkby Road, Syston made pursuant to a Section 106 Agreement dated 20 September 2011 as supplemented by a Supplemental Agreement dated 22 December 2011

**Pursuant to Section 106A  
of the Town and Country Planning Act 1990 (as amended)**

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Devonshires Solicitors LLP  
30 Finsbury Circus  
London  
EC2M 7DT

Ref: FZK/MID22.51

**THIS DEED OF VARIATION OF SECTION 106 AGREEMENT** is made the        day        of  
2020

**BETWEEN:**

- (1) **CHARNWOOD BOROUGH COUNCIL** of Southfields, Southfields Road, Loughborough, Leicestershire LE11 2TX ("**the Council**"); and
- (2) **MIDLAND HEART LIMITED** of 20 Bath Row, Birmingham B15 1LZ ("**the Association**").

**WHEREAS:**

- (A) The Association is the registered proprietor of the freehold estate registered with title absolute at H.M. Land Registry under Title Number LT447898 which is comprised of 17-25 (odd) John Frear Drive, Syston, Leicestershire, LE7 2DN and 2 Eatough Close, Syston, Leicestershire, LE7 2DP ("**the Property**").
- (B) The Property is subject to a Section 106 Agreement dated 20 September 2011 made between (1) David Wilson Homes Limited (2) BDW Trading Limited (3) William Davis Limited (4) the Council of the Borough of Charnwood and (5) Leicester County Council ("**the Section 106 Agreement**").
- (C) The Property is also subject to a Supplemental Agreement dated 22 December 2011 made between (1) Charles Church Developments Limited (2) the Council of the Borough of Charnwood and (3) Leicester County Council ("**the Supplemental Agreement**").
- (D) The Property is subject to a Legal Charge dated 2 October 2018 in favour of Prudential Trustee Company Limited ("**the Lender**"). The Lender has provided its written consent to this Deed.
- (E) Charles Church Developments Limited are not a party to this Deed as they no longer have any interest in the Property.
- (F) The Council and the Association have agreed that the Section 106 Agreement and the Supplemental Agreement shall be varied in the manner hereinafter appearing and pursuant to Section 106 and Section 106A of the Town and Country Planning Act 1990 as amended.

**NOW IT IS AGREED** as follows:

**1. Definitions and Interpretation**

Save where the content otherwise requires, words and expressions defined in the Section 106 Agreement shall have the same meaning when used in this Deed.

**2. Variations**

The following variations will be made to the Section 106 Agreement, detailed as follows:

A new clause 35.2.3 to be added to the Section 106 Agreement consisting of the following:

35.2.3 Clause 35.2 in this Agreement shall not be binding on a mortgagee or chargee (or any receiver (including an administrative receiver) appointed by such mortgagee or chargee or any other person appointed under any security documentation to enable such mortgagee or chargee to realise its security or any administrator (howsoever appointed) including a housing administrator (each a Receiver)) of the whole or any part of the Affordable Dwellings or any persons or bodies deriving title through such mortgagee or chargee or Receiver.

**3. Miscellaneous provisions**

3.1 Except as varied by clause 2 of this Deed, the Section 106 Agreement and the Supplemental Agreement are otherwise confirmed by the parties hereto and remain in full force and effect.

3.2 This Deed is a Local Land Charge and the Council shall register it in its Register of Local Land Charges in accordance with the provisions of the Local Land Charges Act 1975 and Section 106(11) of the Town and Country Planning Act 1990 as amended.

**IN WITNESS** whereof this Deed has been executed by the parties hereto and is intended to be and is hereby delivered on the date first above written.

EXECUTED as a Deed by affixing the Common Seal of  
**CHARWOOD BOROUGH COUNCIL** in the presence of:

.....  
Authorised Signatory

EXECUTED as a Deed by affixing the Common Seal of  
**MIDLAND HEART LIMITED** in the presence of:

.....  
Authorised Signatory

.....  
Authorised Signatory