

## **Mixed tenure agreements**



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**A review of partnership models**

**Martin Willey and Peter Scott with Martin Howe,  
John Bosworth, Steve Hughes and Nigel Campbell**



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YTP are strategic regeneration and partnership consultants.



## Bevan Ashford

Bevan Ashford are a national specialist law firm with extensive experience of PPP, PFI, planning and regulatory issues derived from working with both public and private sector clients.

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# Foreword

Earlier this year the Joseph Rowntree Foundation published a report from Professor Christine Whitehead (Cambridge) and Professor Tony Crook (Sheffield) on planning gain and Section 106 Agreements. It concluded that this approach to securing a plentiful supply of affordable homes was not working well. Local authorities frequently lacked the sophisticated negotiating skills to trade planning consents for more socially advantageous development; there were conflicting objectives among the different players, including within local authorities where there was competition – between housing, environmental, educational and economic interests – for the benefits from planning gain.

Perhaps the most central of the areas for potential confusion and conflict lies in the linkages between the house builders who are keen to develop the land for homes for sale, and the housing associations whose role is to provide affordable accommodation. Both these parties find themselves making compromises they do not like. House builders may have to make concessions too late in the process to reduce the price they pay for the land; and housing associations may have to accept segregated land on the worst parts of the sites, or sub-optimal quality or an unfavourable financial deal.

Of course, everything would be far easier if (a) the planning system delivered plenty of sites with planning consent and acute shortages were eased; and (b) there was a much higher level of public funding available to fully finance a good mix of affordable housing on all available sites. But, for sure, neither of these changes will happen quickly. Everyone must work within the world as it is.

A cornerstone to achieving better results is for house builders and housing associations to learn to operate better together. Less hassle and more co-operation would not only save time and money initially, but would make the best use for the longer term of the different skills of these two key players.

This report, by Martin Willey and colleagues from Bevan Ashford, is a useful exploration of how positive links can be made, how objectives can be shared, and how each can play their part in creating mixed tenure developments that provide opportunities for all.

On the local authority side, the report highlights the characteristics of ‘enabling’ good practice and evaluates a range of successful measures.

## Mixed tenure agreements

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The authors conclude with recommendations – drawing on a knowledge of successful processes in other parts of Europe –designed to make the whole process speedier, non-adversarial and generally more productive. They also provide some food for thought on national policy development. We are greatly in their debt.

Richard Best  
3 December 2003



# Executive summary

The Joseph Rowntree Foundation appointed Martin Willey and Bevan Ashford **to review Sect. 106 and Joint Venture Agreements for mixed-tenure communities, to identify best practice and to recommend policy and process changes**. The principal findings of the review are as follows.

- A The evaluation of agreements and consultations with House Builders (HBs) and Registered Social Landlords (RSLs) established that land supply, planning and housing policies and processes for social/affordable homes were material to the development of best practice and thus also to legal structures and documentation.
- B The following policy and practice recommendations are made. They are aimed at central government, local authorities (LAs), English Partnerships (EP), the Regional Development Agencies (RDAs), the Housing Corporation (HC) and the industry (HBs and RSLs).

## 1 Policy

- The use of private sector partners in the development of publicly owned land or the acquisition of a public interest in privately owned land, are mechanisms that should be more widely utilised to increase housing land supply.
- LAs, EP and the RDAs should make more positive use of Compulsory Purchase Order (CPO) powers in area land assembly at the request of HBs and RSLs.
- There should be a clearer statement of Sustainable Community requirements in the release of major public sites.
- Strategic partnering arrangements between HBs and RSLs should normally become a prerequisite for the bidding for major public sites (a partnership protocol is offered) and should be introduced, where possible, at the conception of a project.
- The housing and planning policies and practices of LAs should be better integrated.
- There should be greater clarity in government planning policy on affordable housing in terms of what it is legitimate for local planning authorities to require.
- Public capital controls and regulatory constraints should be eased further to increase public returns on investment, to secure cash flow benefits of deferred land purchase (phased land transfer payments) and to provide for the reinvestment of receipts in future Sustainable

Communities. A two-year 'amnesty' is recommended to allow LAs to recycle all housing capital receipts back into affordable housing schemes, whether from Large Scale Voluntary Transfer (LSVT), rights to buy, Arms Length Management Organisation (ALMO) or land disposal.

### 2 Practice

- Greater standardisation of social/affordable housing specifications should be agreed to reduce the negotiation time between HBs and RSLs.
  - Central government should suggest model clauses for Sect. 106 agreements to achieve social/affordable housing.
  - The recently launched 'BE Collaborative' model construction agreement, which provides for effective costing, management of risk and secures the economies available from enhanced supply chain management, should be considered for general use.
  - A Housing Corporation Partnership Programme for at least three-year funding of larger, longer-term schemes should be introduced.
  - The community should be engaged early in major mixed tenure housing schemes.
- C A model framework for a Sect. 106 agreement is offered together with model clauses for agreements covering mortgagee in possession (long and short), safeguarding shared equity tenants, Expert Determination, settlement of Master Plans, affordable housing pricing formulae, phasing and consultation/community involvement.
- D Proposals to build on this report follow, suggesting where the public and private sectors might be encouraged to act. Suggestions include the consideration of new social/affordable housing funding mechanisms to sustain housing stock for these purposes, and the development of the NHS Local Improvement Finance Trust (LIFT) health care partnership model into affordable housing and Sustainable Community models.

# 1 Commission

The Joseph Rowntree Foundation identified a gap in best practice where the complexity and multiplicity of development, partnership and Sect. 106 agreements in the provision of social/affordable housing constituted a major hurdle to efficient delivery.

Martin Willey (YTP), Strategic Regeneration and Partnership Consultants and Bevan Ashford, Solicitors, have been commissioned by the Foundation to carry out a study of development and other agreements between House Builders (HBs) and Registered Social Landlords (RSLs), mainly Housing Associations, in the provision of mixed-tenure housing schemes. They have been asked to make recommendations for future partnership models. They have collected, in confidence, 14 development, Sect. 106 and other agreements from HBs and RSLs (see Appendix 1) and have interviewed 11 bodies (see Appendix 2) in reaching their conclusions.

They have particularly benefited from networks deriving from a national initiative between HBs and RSLs brought together under the auspices of a House Builders Federation (HBF)/Office of the Deputy Prime Minister (ODPM) commission of YTP to develop co-operation between the Major House Builders and government. They have also benefited from a similarly resourced regional initiative by the HBF, the CBI and RSLs to look at new mechanisms for the delivery of housing. These, together with the expertise and experience of Bevan Ashford in planning, Sect. 106 agreements and the knowledge of their RSL, HB and RDA clients, have allowed details of the processes and practices that precede and follow agreements, as well as the agreements themselves, to be evaluated.

## 2 Context

The JRF commission comes at a timely moment following the publication of the Sustainable Communities Plan by the Office of the Deputy Prime Minister (ODPM). Other influencing factors include the:

- restructuring of ODPM to create a new 'Sustainable Communities Delivery Unit'
- emerging Planning and Compensation, and Housing Bills
- bringing together of English Partnerships (EP) and the Housing Corporation (HC) applying Millennium Community, Challenge Fund and other conditions to publicly released sites
- creation of Regional Housing Boards to prepare Regional Housing Strategies to define need and provide the basis for grant to parallel the Regional Spatial Strategies of Regional Assemblies, which define overall housing need and land requirements
- review of PPG 3
- Treasury/ODPM commissioned Barker Review into housing land supply, the studies into the capture of future land value created by planning consent to invest in strategic and site infrastructure and the stated intent to secure a better return from public investment in all its forms
- Housing Corporation Reinventing Investment paper.

The significant increase in ODPM resources for affordable housing and the emerging 'partnering' conditions of the HC for future funding support, together with EP's role in the release of public and future surplus public land and their new Housing Gap Fund, will provide many opportunities for the application of the results of this commission. Doing so will make a significant contribution towards resolving some of the more difficult problems standing in the way of the delivery of social/affordable homes and alleviating some of the undesirable aspects of the current vibrant housing market.

# 3 Key issues

The evaluation process has led to a distinction between public and privately owned land. The former achieves social/affordable housing through conditions of sale, the latter through Sect. 106 agreements. The key issues that have emerged from consultation, in the general chronological order in which they occur in a project, are as follows.

## 3.1 Land supply

The burden of paying for affordable housing is increasingly falling on the land owner/ developer by increasing the subsidy to the RSL through free serviced land and fixed cost build contracts. At the same time schemes tend to include fewer open market houses through which to recover the costs, although PPG 3 requirements for increased densities have impacted on this. In consequence, depending on the precise circumstances, one or both of the following may well happen.

- The cost of the open market units could increase.
- The amount paid for the land will decrease.

Rising private markets put private market housing further out of the reach of those on lower incomes and creates a gap between market housing and that provided by RSLs. It may also seem inequitable that new house buyers should contribute disproportionately to social/affordable housing.

Furthermore, if land prices fall, landowners may be inclined to hold on to their land and hope for better prices in the future, thus reducing land supply.

There is a substantial amount of surplus publicly owned brownfield land apparently available for housing. This, together with the substantial areas of land owned or optioned by the private sector, constitutes the 'raw material' for the delivery of Sustainable Communities. Both the public and the private sector can share in the 'value uplift' resulting from planning consent provided their respective contributions – and risks – are properly structured within appropriate partnership agreements.

Current initiatives by various public bodies are resulting in a more structured release of land for development. EP is monitoring the sites being released by government departments as surplus and is also acquiring sites for specific housing needs. The RDAs are also acquiring sites for mixed use and employment purposes. The release of such land where appropriate should be on terms requiring partnering arrangements between HBs and RSLs. Such arrangements allow a variety of mechanisms to be put in place to resolve issues such as tenure mix, design, costs and programming at an early stage.

EP has further developed that positive approach by undertaking 50/50 per cent joint ventures for substantial sites, one in the East Midlands and one in East London. This is designed to cut through some of the complexities of delivering contaminated and poorly serviced brownfield sites in areas where there appears to be a high level of demand for housing, both open market and affordable.

In one of the cases considered, an LA has sold land to an RSL on terms where super profits arising from either increased rents or open market land sales would be ploughed back as equity for future social/affordable housing requirements in the area.

### 3.2 Planning

Planning policy at a national level sets out the basis for the assessment of housing need, which, at the local level (through local plans and supplementary planning guidance), dictates the proportion of affordable/social housing required through agreement and condition of sale. Local housing authorities through Housing Needs Assessments are also providing their assessments of local housing need and the Regional Housing Boards are also reflecting their assessment in their Regional Housing Strategies. Individual sites generate the need for development-associated infrastructure over and above social/affordable housing. Reductions in the government capital allocations and capital controls for LAs have also resulted in the latter seeking to secure capital programmes for public facilities as part of individual negotiations on Sect. 106 agreements. House Builders (HB) believe that their activities are now taxed more than most other industries, at a cost primarily applied to the land value. There are clear signs that this is reducing land values on many brown field sites so that the residual development value over Current Use Value (CUV) is almost disappearing. This will discourage landowners from selling and reduce housing land supply.

The overall housing market is dominated by around a dozen major HBs but they and the medium-size HBs own or have optioned the majority of planned and likely future releases of housing land on price terms that can limit the scope of the HB to agree Sect. 106 terms.

Case law on Sect. 106 agreements has cast doubt on whether it is always necessary to have an RSL as a party. Practice varies from authority to authority, and not all RSLs are geared up to being party to Sect. 106 agreements. Often, at this stage of the process, they do not know whether they will be able to commit to funding, nor when.

These factors have a major impact on the content of Sect. 106 agreements and, most importantly, on the speed with which consents are secured with a consequent delay in providing housing. Although the total land bank for housing has not changed, consolidation in the industry has been necessary to increase individual company land banks from one to two, to three to four years. This is a direct consequence of the problems and timescales involved in securing planning consents.

PPG 3, in seeking a sequential approach giving priority to brownfield as opposed to greenfield housing sites, has also had an impact on land supply. Brownfield sites are invariably more costly to prepare and service. Expectations as to how much social/affordable housing brownfield sites can afford to provide often do not differ from greenfield sites. Some authorities are prepared to accept that the amount be reduced depending on evidence of viability, but there is little consistency in approach. To establish costs and generate a fixed programme when there are so many uncertainties in simply securing land complicates Sect. 106 agreements.

### **3.3 Strategic partnering**

A working group of Major House Builders (MHBs) and RSLs with wide experience of effective strategic partnering has produced a protocol (see Appendix 5) for strategic, long-term joint action in the provision of social/affordable housing. The rationale for this is as follows.

- Strategic partnering backed by long-term funding commitments offers the best prospect of securing an early and significant increase in the supply of social/affordable housing.
- An increase in volume of social/affordable housing will provide the conditions for improvements in productivity, including those achieved through modern methods of construction (MMC), such as off-site manufacture (OSM).
- Government intervention and investment in associated education, health, community and transport facilities and in land assembly, if focused on large-scale housing releases, will be more effective in creating sustainable communities.
- Certainty of government funding for longer programmes would achieve economies of scale, cost stability, improvements in quality and the facility to negotiate Sect. 106 agreements in a shorter timescale, whether on public or private land.

- Strategic partnering provides the opportunity to increase standardisation with benefits of cost stability and improvements in quality without compromising design quality.
- Strategic partnering recognises the commercial skills of Major House Builders (MHBs) and the long-term management skills of RSLs adding value through co-operation.

What is significant is that both parties have devoted the resources and commitment to ensure that delays are reduced to a minimum. Over time, as trust builds up, major economies, and improvements in standardisation and quality can emerge.

### 3.4 Planning agreements – process

The present unsatisfactory release of land for development, and particularly for social/affordable housing, delays the process of concluding Sect. 106 agreements.

It is rare for forms of Sect. 106 agreement to be settled at the time the local planning authority makes a resolution to grant planning permission. Often the detail of a housing department's requirements for social/affordable housing on the site will not have been considered at the time of the resolution and thus it will be insufficiently precise as a basis for preparation of the formal document.

The developer will be urgently seeking to agree terms in order to secure his planning permission and commence development. Thus, the agreement will be negotiated under pressure. The involvement of a third party at this stage, namely an RSL, can add considerably to delays.

The situation could be improved (at least on major applications) if the key clauses of the Sect. 106 agreement could be negotiated prior to the resolution to grant consent. That negotiation should include where possible the relevant RSL that is intended to take the affordable housing land. *Bevan Ashford has prepared a detailed model Sect. 106 framework (see Appendix 6).*

Where that is not possible, an HB can offer a unilateral obligation in lieu of the Sect. 106 agreement incorporating the terms that the HB believes would be mutually acceptable on all matters of planning gain, including social/affordable housing.

That solution is not without its problems. It may be perceived by the planning authority as an aggressive stance that can delay negotiations on the merits of an application. Further, where highway infrastructure or other infrastructure is needed,



positive covenants from the local authority may be required to secure a workable agreement and the local planning authority may be reluctant to cover the provision of such infrastructure by a negatively worded 'Grampian' planning condition. Further, bilateral agreements (Sect. 106 or Sect. 278) would still therefore be required.

### **3.5 Local housing need and tenure mix**

LAs currently have responsibility for defining local housing needs on individual sites. Whether this will change with the advent of Regional Housing Boards and Strategies is open to speculation. Certainly, there is a clear indication that sub-regional assessments on a cross-authority basis will emerge to try to reflect real market areas rather than administrative boundaries. Co-operation between the LA housing and planning arms is variable and can have an effect on the speed and detail of Sect. 106 negotiations.

There are many examples of HBs determining the type of housing in response to density negotiations with the planning authority and then offering small units of accommodation to RSLs, which do not necessarily reflect defined priority housing needs for larger family accommodation. There are many circumstances where this is nonetheless appropriate with a significant need for small units. Conversely, the different occupation levels of affordable/social housing with larger private external space requirements in comparison to market housing has created problems for HBs with an increase in land take and impact on negotiated consents and densities. The RSL preference for the integration of affordable/social housing into market housing has management and future charge implications where, in high-value schemes, RSL tenants cannot afford them. There is also evidence of either party offering secondary locations to the other, depending on which of them controls the site.

### **3.6 Selection of partner**

There are issues here concerning the timing of selection of a partner and who controls it. Timing is often late in the development process for a number of reasons that will tend to mean that the social/affordable housing supply will not always meet the demand in terms of type or quality. The HB will be concerned that an LA nomination will result in the HB having to work with an unsuitable RSL and that the RSL may use its preferred position in cost negotiations. Further, an RSL may find it difficult to commit because of delays and uncertainty relating to grant availability. On the other hand, RSLs may well perceive that they are selected on the basis of their willingness to fit their needs to what the HB wishes to make available or indeed on price alone.

The position could be improved by there being a clear pricing mechanism in the Sect. 106 agreement. While this is common practice in many agreements, government policy on whether this ought to be sought is ambiguous and many HBs therefore still seek to resist such details. The development within the industry of more partnering arrangements between HBs and RSLs will lead also to economies of scale, cost stability, quality improvements and shorter timescales for Sect. 106 agreements.

### **3.7 Standardisation**

There are at least 19 different, sometimes overlapping, standards for social/affordable housing (see Appendix 3). There is anecdotal evidence of a wide range of waivers to the primary standard, the Standard Development Specification (SDS), at the joint request of RSLs and HBs. There is also evidence that a number of HBs have secured HC accreditation of some standard house types, which provides a flexible interpretation of SDS. The potential benefits of a simplified set of standards are self-evident: consistency of quality, cost stability, construction management and supply chain enhancement. Social/affordable family housing needs different standards to market family housing. This is because social/affordable housing has higher levels of occupation and the RSLs need finishes that will be easy to maintain and will last 15 years. Market family housing has a higher level of turnover. Owners expect greater choice and tend to 'customise' their homes more regularly. Clearly established standards for the social/affordable homes sector will also help home builders and facilities management providers to respond efficiently to their respective remits.

### **3.8 Construction procurement**

The contractual arrangements that usually underpin schemes are the Joint Contracts Tribunal (JCT) standard form of building contract, the New Engineering Contract (NEC) Engineering and Construction contract and the Association of Consultant Architects' Project Partnering contract ('PPC 2000'). To these can now be added the new 'BE Collaborative' contract, which was formally published in September 2003 although it is already in use on a small number of pilot projects. In discussions, consultants engaged by the Office of Government Commerce (OGC) to carry out a review of existing contracts have referred to this as 'by far the best form of contract to underpin a genuine collaborative relationship'. It is presently being considered for adoption by the JCT and the Local Government Association.

Experience suggests that the construction industry suffers four major problems.

- *It rarely spends adequate time in preparing before it builds:* all too often tenders are conducted on the basis that they produce a 'fixed' price and programme, which the successful tenderer is then being asked to deliver. Usually, both price and programme will have been arrived at on the basis of a six-week tender period considering the project in competition with other contractors, and, not surprisingly, these estimates of the cost and time prove to be wrong.
- *It is very poor at managing risks:* the BRE have in the past undertaken work comparing risk management on a number of partnering and traditional contracts. It hoped to find that the partnering contracts were better at managing risks. Unfortunately, it discovered that risks were poorly managed under both.
- *It knows the price of everything but the cost of nothing:* contractors are used to quoting prices without understanding the underlying costs. Each price will include a profit element (which may be known), a risk element (which will usually be arrived at by a back-of-envelope calculation) and an estimate of cost. The estimate of cost will not be accurately known. Rather, the overall 'price' will be based on the contractor's recollection of the out-turn cost (or sometimes even the tendered price) for a previous project. This situation is exacerbated down the subcontract chain where subcontractors adopt a similar approach, often with the result that the same risks are included in both subcontractor and main contractor prices without realisation.
- *It does not involve its supply chains:* (as Sir John Egan has noted, 'A fully tendered project costs twice as much as a fully integrated project. Of the savings under a fully integrated project, one-third comes from integrating the project team. Two-thirds comes from integrating the supply chain.').

A collaborative or partnering approach can improve the above situation.

### **3.9 Modern methods of construction**

The government would like to secure an increase in off-site manufacture (OSM) as part of an overall change in the methods of housing construction. The primary problem for the OSM manufacturers is that there is not yet enough volume to secure the economies of scale to bring prices to a level comparable with traditional building. Nonetheless, there are now a dozen or so OSM manufacturers working at resolving management/supply chain issues and addressing skill needs to respond to

government requirements such as the 25 per cent OSM requirement for HC Challenge Fund schemes. There will continue to be such requirements attached to the release of government-owned land.

### **3.10 Project/development management**

In mixed tenure schemes, project/development management is mainly an HB responsibility. Nonetheless, the performance of the RSL agent and the flexibility with which they exercise their responsibilities, however encapsulated in an agreement, determine the success of implementation. This varies considerably throughout the country.

Public realm management is another area where sustainability and proper community development requires more than mere provision of relevant open space and commuted sums for management. The aim is to avoid, wherever possible, anti-social behaviour while at the same time avoiding high, and in some cases unaffordable, service charges. An RSL will normally have a longer-term interest and, on lower-value schemes, more applicable management expertise than the HB.

### **3.11 Funding**

The key financing issue for both parties is the cost of capital in holding land once acquired. Recent public sector releases have allowed for deferred land purchase to help ease cash flow. The HC grant regime has changed and is still changing and Challenge Fund and other HC grant may in future require parallel partnering agreements. The funding of social/affordable housing is through direct HC grant, reinvestment of RSL surpluses and Recycled Capital Grant Funding (RCGF), Sect. 106 contributions (effectively a cost on land) and funding captured within the various loan-financing arrangements of both parties. The HBs are also developing alternative arrangements for affordable housing, with or without grant, and RSLs are embarking on some market housing as a means of developing surpluses for reinvestment.

### **3.12 Risks, returns and overage**

Although each scheme will have its own special requirements, the wide range of arrangements suggests that several approaches are workable. HB returns of at least 22 per cent return on capital employed (ROCE) require efficiency in the procurement of a planning consent and Sect. 106 agreement, whether they have an interest in land or whether they are competing for publicly owned land. RSLs have lower expectations more aligned with the public sector borrowing requirement (PSBR) but the issue of who receives the staircasing receipts from shared ownership houses is

creating a problem in negotiations between HBs and RSLs. RSLs rely on future receipts to cross-subsidise less profitable activities and still see this finance as 'public'. HBs see this as future income to set against early risk investment or as additional profit.

### **3.13 Time-limited grant funding**

The Housing Corporation imposes time limits on the period within which grant must be spent. Where RSLs are brought into the development proposals at an early stage, if there is a hold-up in negotiation of the Sect. 106 agreement or in the commencement of development (as the payment of grant may be dependent on reaching a stage in construction), then the RSL may be forced to reapply for funding part-way through the negotiations with the LA. There is no guarantee that the same level of funding will be forthcoming. This in turn can lead to unravelling the funding for all the other interests to be catered for in the Sect. 106 agreement. It can also lead to a disjointed approach to the development programme if the affordable housing has to be partly constructed by a certain date to ensure payment of grant, even though the units concerned are part of a site that would not otherwise be developed. This is not usually an issue where serviced land is handed over to the RSL.

Waiting until the planning permission is secured creates an element of certainty over the timeframe before the RSL makes its approach for grant funding. However, if there is any delay over the progress of such an application, the HB may experience difficulty in complying with the Sect. 106 agreement. This will typically require construction or transfer of the affordable housing (or land for the affordable housing) before occupation of a certain number of open market houses.

### **3.14 Long-term partnering programmes**

Long-term joint planning for both RSLs and HBs will significantly assist the development process. If large programmes are to be achieved and costs are to be contained, it is important that both RSLs and HBs have a reasonable degree of certainty in terms of the flow of public finance. The process that has existed for the last 15 years has generally been characterised by the distribution of relatively small sums of capital finance to a larger number of RSLs. They, in turn, have generally worked with a smaller number of HBs. Nonetheless, the process has not enabled either side to make longer-term commitments about land assembly, construction methodology or cost savings. Attempts have been made in the past to address these issues through Volume Programmes and Cash Programmes, although neither type of initiative was developed beyond an experimental stage.

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It is important that long-term relationships between HBs and RSLs are fostered with the specific purpose of delivering better quality housing that represents better value for money. Thus, the system of allocating public finance for housing needs to be radically overhauled and replaced with one that gives greater certainty to both developers and associations. This would make the process for reaching both development and planning agreements much easier to achieve. Several of the consultees proposed longer-term partnering programmes and arrangements as key to the efficient delivery of social/affordable housing. It may be that a derivative of NHS Local Improvement Finance Trust (LIFT) could provide the longer-term consistency of approach that past initiatives have lacked.

## 4 Agreement analysis

Appendix 1 lists each agreement evaluated but this chapter covers the clauses that offer the most scope for delivering best practice recommendations.

### 4.1 Master Planning

The settlement of the Master Plan is potentially a very contentious issue. This will particularly be the case where planning consent has still to be obtained. In the agreements studied, the HB was perceived to be the best party to pursue the planning process, in part because it was the developer but also to reduce public costs. Nonetheless, public sector requirements for social/affordable housing and other objectives required co-operation. Essentially, it must make sense for the parties to agree at the outset either the whole of the Master Plan or at least those elements of it relating to design standards, sustainability and community development.

*Commentary: such matters are not capable of independent arbitration. If, for commercial reasons, it is essential to finalise agreements based on a Master Plan before those matters either have been or can be resolved, then the probability is that the landowner would have the final say on such matters. If those issues bona fide rendered the project non-viable from a commercial angle, consideration could be given to releasing the parties from the agreement with an element of compensation for costs incurred going to the HB.*

### 4.2 Infrastructure/remediation works

In most instances, the public sector will have a list of infrastructure or other community elements it requires as part of the overall project. Whether these complement the provisions of a Sect. 106 agreement or replace them, substantial upfront costs are incurred. Often, the type of land that tends to come into this situation requires substantial expenditure on infrastructure and remediation. Many agreements therefore have the public sector seeking to drive the HB to implement the infrastructure and enable development at a reasonably brisk rate. However, the HB will be concerned to ensure that its total spend in any one year will not be exceeded by either a pre-agreed capital commitment or the amount of value that can be released from development following on from completion of a phase of infrastructure/remediation work.

Most agreements therefore contain a provision for settlement of a phasing plan ensuring what stage the infrastructure should reach in any given period and how much or how many housing units should be developed or how much developable land should be drawn down in that period. If the phasing plan is not met, it is open for

the public sector either to step in to proceed with both the infrastructure works and the sale of a development plot to a third party or to determine the agreement. The latter is very much a matter of last resort, not least because of the complications that could arise where, for example, infrastructure building contracts are in place or designers are appointed.

*Commentary: while step-in agreements and collateral warranties may be available, management of such matters in default is notoriously difficult. It is clearly sensible to have, at an early stage in the process following planning permission, a worked out development and phasing programme in a Master Plan and a tightly drawn arrangement for varying that programme where market conditions so require.*

### 4.3 Social/affordable housing – Sect. 106 issues

Where no RSL is involved in the negotiation of the Sect. 106 agreement, problems can arise because of the terms of the planning permission and/or the Sect. 106 agreement.

Three examples merit comment.

- 1 *Pricing:* while many older agreements require the identification and transfer at a price reflecting a minimum servicing cost, the trend is to the provision of built units either for rent or shared ownership. Policy on whether Sect. 106 agreements should dictate pricing is unclear – although to do so is clearly not unlawful. Two methods for fixing prices are noted. Both are based on affordability. One reflects affordable rents (i.e. income of those on the housing list) while the other was related to the sum capable of amortisation on anticipated rental income over 25 years.
- 2 *Specification:* ‘pepperpotting’ or ‘tenure integration’ is now becoming more accepted by developers, particularly when the external specification of the RSL units is the same as for the private market units. However, that can lead to difficulties in sensitive locations where the cost of materials needed may exceed what is allowed for in the HC’s Total Cost Indicators. Also, there may be some physical configurations that HBs may resist or that may prove difficult to manage.
- 3 *Funding – mortgagee in possession clause:* the restriction on use of affordable housing is a hindrance to funding either by the RSL on its own acquisition or by shared owners.



This latter point has occurred several times with a number of LAs. In essence, the structure of the agreement does not allow for people in shared equity accommodation to acquire a 100 per cent interest in the property. These situations are usually envisaged by the LA and by the Housing Corporation standard lease documentation. If the Sect. 106 agreement or planning condition does not make provision for this, it will usually require later amendment, which falls as an additional cost in money and time, usually on the RSL. Government policy in circular 6/98, which suggests these clauses are not needed, is not helpful.

The importance of a suitable mortgagee in possession clause is crucial in practice to the RSL being able to fund the development. Lending institutions are becoming increasingly sensitive, not just about the presence of a mortgagee in possession clause but also about its terms, and an unfavourable clause may affect the rate that the RSL can borrow at or even the decision to lend at all.

*Commentary: there are thus good reasons to include an RSL in early negotiations between the developer and the LA, although additional time may be required in working through compromises acceptable to all parties. There may also be a conflict of interest between the HB and the RSL. The HB will be trying as hard as possible to reduce the subsidy to the RSL while the LA and RSL will be trying to extract as much as possible towards the funding of the social/affordable housing. The LA may also be faced with conflicting demands for other facilities such as education, public transport and community/health facilities. A checklist of issues for resolution in a Sect. 106 agreement would guide negotiations by all parties.*

#### **4.4 Land assembly**

Three different types of clause in different locations have been evaluated.

- 1 A substantial brownfield site was considered; the redevelopment of which was constrained by absence of control of land required for junction improvements. In this instance, the LA had allocated the site for residential development in the current local plan. The LA had agreed in the Sect. 106 agreement to use its compulsory purchase powers at the request and cost of the landowner. The landowner gave suitable indemnities to the local authority and the threat of the use of the CPO powers was sufficient to persuade the residual landowner to negotiate a sensible price for the release of the relevant land. There was a potential valuation difficulty from the residual landowner's point of view had it needed to go via the CPO route.

*Commentary: in a time of rising land values, there is a danger that the values used in agreeing a sale would be rather different from those used in assessing compensation for the land acquired.*

- 2 The Bristol model (see also 4.9) was considered and it addresses the problem of the tenant's right to buy. The estate in question had been constructed by using the Prefabricated Reinforced Concrete (PRC) method and it was considered uneconomic to carry out repairs. The tripartite arrangement between local authority, RSL and HB provided for the LA to use specific CPO powers in respect of two previously sold units and a sweeper CPO covering the balance of the estate dealing with the impact of future right to buy applications.

*Commentary: this would appear to be an effective formula for ensuring that a much needed regeneration project was not frustrated by a few individuals. There had at the outset been an extensive community consultation process.*

- 3 Finally, two agreements were considered between a public body and an HB whereby there was provision for additions to be made to the subject site during the course of the joint venture arrangement. In one, while each party had consultation rights, it was open for either party to expand the subject site. The formula for distribution of eventual proceeds was adjustable to reflect both the receipts from that additional land and the costs of acquisition and remediation.

*Commentary: while the HB needed to ensure it was not bound to fulfil its development enabling duties in respect of the larger site in a manner that was commercially viable, equally the LA needed to ensure that it received appropriate benefit from the development of the overall site where that development largely constituted the LA's original land holding.*

### 4.5 Partnering – development

Two types of situation were evaluated, first, where an LA was attempting to deal with deficient housing stock otherwise than via an LSVT or an ALMO. The identified site was split between demolition and newbuild and, where cost effective, refurbishment for rent/shared ownership and homes for open market sale could be secured. The other situation was where an LA, English Partnerships, or the RDA held land that was allocated for development. That body agreed a joint venture vehicle jointly or separately between an RSL and an HB. In the latter context, English Partnerships and, subsequently, various RDAs have created substantial standard form documents.

*Commentary: in each of these situations, there is scope for the public body to impose requirements consistent with the many initiatives currently in place for providing 'decent homes' within 'sustainable communities'. With that in the background, there remains the need to ensure best value (compliance with Local Government Act 1973 Sect. 123) and comply with State Aid Rules.*

The funding arrangements will depend very much on the availability of grant, which will in itself often depend on the presence or otherwise of a market for open market housing.

There appears to be a range of approaches to the manner in which a site should be developed over a period. Some agreements seem excessively prescriptive as to what is to happen over a five to ten year period rather than provide for a mechanism by which the development can respond to housing needs over that period.

#### **4.6 Partnering – regeneration of rundown housing estates**

Schemes considered were from a wide range of geographical areas from Glasgow, Edinburgh, Hackney, Harrow and Bristol. In some cases, grants were available from Social Housing Grant (SHG) or Challenge Fund or similar sources while others were substantially dependent on the creation of land value. In a grant-free world (as in Bristol), there was a total dependence on open market land values being sufficient to create the necessary equity for an RSL to build out the affordable housing required.

*Commentary: bank funding would be available to the RSL insofar as its track record and the likely income from the affordable elements of the scheme would justify.*

The land was in each case substantially owned by the LA (a few rights to buy had to be pulled out) but the second party would vary. The provider of open market housing was in some cases completely independent of the RSL (e.g. Bristol). In another case, an RSL took on the entirety of the development, building out the open market housing itself, thus releasing the developer's profit either for the affordable housing within the scheme or for its own reserves for future affordable housing projects. Finally, there were cases where contractual or corporate joint ventures (JVs) had been created between an HB and an RSL to bid for a project together.

*Commentary: while the concept of the JV between an HB and an RSL is attractive and ought to speed up the process in terms of transaction time and cost, planning negotiations, building design and procurement, the political and community advantages of the Bristol method should not be ignored. The concept of community involvement in the re-provision ought to bring benefits in local support for decanting arrangements and the arrangements for buying in properties previously sold under the right to buy regime.*

### 4.7 Partnering – construction

Appendix 4 provides a detailed evaluation of four of the contractual solutions available for construction procurement. The evaluation of agreements led to the following requirements.

- *Allowing adequate time for preparation*, e.g. by engaging contractors under a two-stage procurement process. The first stage (pre-construction) allows their input of build ability into the design and enables them to understand fully what they have to do, how they intend to do it and what the risks are before arriving at their price. Protection can be afforded to the sceptical client by requiring the contractor to consider not just capital costs but also whole-life costs during this period. Details should be provided to the contractor including the maximum amount that the client is willing to spend on the project on day 1. Independent costs consultants should work closely with the contractor to fully understand and check estimates of intended cost.
- *A contractual requirement to carry out regular risk management* is a starting point that most contracts do not recognise (the honourable exceptions being the 'BE Collaborative' contract, PPC 2000 and the Ministry of Defence's (MoD's) Defcon 2000). The next step is to recognise the possibility of an allocation of legal responsibility for the occurrence of identified risks to the party best able to manage that risk – a mantra that is repeated throughout the industry but nowhere reflected in contract conditions other than under the new 'BE Collaborative' contract.
- *Requiring open-book accounting* starts to cut through the industry's predilection for all-encompassing 'prices'. A target cost arrangement, with separate profit element and risks being dealt with openly in a risk register and openly priced, is a more effective solution.
- *The proper involvement of supply chain members* can be achieved by requiring contractors to identify key supply chain members at selection stage –

e.g. mechanical and electrical (M&E) subcontractors for a building involving complicated M&E installations – so that they too can influence the buildability of the proposed design. During the first stage, it should also be possible to pre-plan exactly how the works are to be carried out. Attention should be given to subcontractors for related elements requiring that they liaise with each other and the main contractor to discuss how they can more effectively construct key elements of the building (e.g. external envelope). This provides the ability to offer cost savings (quite apart from better ensuring ‘right first time’ construction).

A comparison of the contractual structures available is annexed as Appendix 4.

#### **4.8 Partnering – financial arrangements**

The documentation reviewed illustrated a number of mechanisms for assessing the quantum timing and assessment of base payments and profit shares. In all the agreements considered, the HB/JV partner had responsibility for installing infrastructure on a phased basis and carrying out remediation. In all cases bar one (where EP was a 50/50 contributor towards capital costs), a private sector JV partner was responsible for procuring and funding on an open-book basis these upfront costs. The key to success is to provide sufficient incentive for the investment to be made upfront while ensuring that the public sector partner receives an appropriate return for its input of land as values improve at the later stages of the development. This is particularly the case where some element of the upfront costs has been grant funded.

In one scheme considered, where remediation and infrastructure costs were so substantial as to give nil land value, a public sector developer partner chose to plan and fund infrastructure and remediation on a phased basis, which had to tie in with a programme for the release of development plots either for sale or for development by the partner. The financial arrangements were as follows.

The HB received:

- a percentage ‘fee’ as part of its upfront costs exposure
- first call on land sale receipts to reimburse upfront costs (note that, where the public sector’s land investment had a monetary value greater than nil, this first call on receipts would have been shared equitably between the land value and the upfront costs)
- a percentage of the eventual surplus in the project account

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- first call on commercial development plots at open market value.

The public sector partner received:

- a regenerated site on a sustainable basis
- a substantial proportion of the eventual surplus standing to the project account
- overage on the developer partners' commercial development schemes.

*Commentary: the following are some interesting points that arose from the overall consideration.*

- A scheme likely to take ten years to complete needs to ensure that the land owner receives a full price for all land drawn down over the period which is in sum referable to the initial market value. The developer partner will want to be assured that it does not have to proceed with a programme where high inflation in building costs is not matched by rises in market value of land necessary to render the scheme viable.
- Where land prices have to be reviewed during the course of a scheme, parties may be nervous about reference to third parties and an alternative could be a benchmarking exercise involving the sale of a sample development plot in the open market.
- Where the developer partner is a specialist RSL and retains the affordable housing units, a formula is required for assessing the value to be credited to a project expenditure account. One agreement provided that 92 per cent of the Housing Corporation's 'Acquisition and Works' Total Costs Indicator should be used.
- It is sensible to provide an appropriate formula for sharing/reinvesting staircasing receipts from a shared ownership scheme.
- Finally, the parties should be obliged to seek grant assistance where available and the agreement should provide for an appropriate adjustment to the sharing arrangement, to reflect the level of grants received.

## **4.9 Partnering – joint management arrangements**

All the agreements considered had provision for joint management arrangements and some of them insisted on a strong level of community involvement as well. One of these, relating to a site that would have a major effect on a small market town, required a substantial level of community consultation even before submission of a planning application. The most thorough arrangements related to a scheme in which Joseph Rowntree Housing Trust (JRHT) was involved with the City of York in creating a major new community development. The overall framework agreement there required the early formation of a committee comprising equal representation from the Trust, the Council and a Community Consultative Panel. That panel had responsibility for considering the Master Plan, the long-term management structure development timetable, special needs and the identification of community facilities among various other matters.

The Bristol approach to social/affordable housing is encapsulated in the four-stage redevelopment of land at Filton/Horfield in North Bristol. This included a substantial housing estate built mainly in the 1950s using then-modern methods of construction (PRC). An appraisal of the estate came to the conclusion that repair works were not economic and the best way forward was to demolish and redevelop by stages.

The mechanism used in this case was the creation of the Bristol Community Housing Foundation, originally an Industrial and Provident Society, which has since converted to RSL status. Each phase in the redevelopment programme was split into a freehold area, part of which was transferred via the RSL to an HB with the balance being subject to a building lease between the Council and the RSL. This freehold would be transferred following completion of the RSL social/affordable housing. The scheme avoided the capital controls that would have applied had the Council sold the open market housing land direct to the private sector. No SHG was available or required. Essentially, the value of the open market land was sufficient to fund the building of the affordable housing. The surpluses arising were not in this case recouped by the Council by way of overage but the RSL covenanted that they should go to a reserve, which would be used for social/affordable housing provision in the City Council area.

There were provisions for decanting tenants from the premises to be demolished and for rehousing in the new. The CPO arrangements were used to deal with past and potentially future right to buy problems.

*Commentary: given the understandable drive for sustainable communities, consideration should be given to more generally incorporating arrangements of this nature, notwithstanding that the average house builder might find it difficult to service such an arrangement. If a community committee is well established at the outset, the community representatives should be capable of having a long-term role in managing public realm following completion of the scheme. Higher-value schemes may require a private-sector-led management arrangement but the costs to social/affordable housing occupants may become prohibitive to them unless cross-subsidised or resourced by the RSL in some other way.*



# 5 Conclusions and recommendations

The original commission was embarked upon with the aspiration that some best-practice arrangements and standard clauses would emerge. In practice, with the benefit of a much wider consultation and deeper evaluation, it is clear that considerable improvements in the delivery of social/affordable housing would arise if both policy and process changes were achieved first. This would have the consequence that many of the problems associated with the legal drafting of partnership agreements would diminish and best practice would emerge more quickly. The recommendations therefore include those aspects as well as some model clauses from a historical evaluation.

## 5.1 Policy

### 5.1.1 Housing land supply

***Recommend: the use of private sector partners in the development of publicly owned land or the securing a public interest in privately owned land, are mechanisms that should be more widely utilised to increase housing land supply.***

Appropriate partnership agreements, structured to reflect current best practice and experience from other sectors, provide a framework within which all parties can share in the resulting 'value uplift'.

### 5.1.2 Public land assembly and release

***Recommend: LAs, EP and the RDAs should make more positive use of Compulsory Purchase Order (CPO) powers in area land assembly at the request of HBs and RSLs.***

***Recommend: There should be a clearer statement of Sustainable Community requirements in the release of major public sites, albeit with some flexibility to accommodate future market changes.***

***Recommend: Strategic partnering arrangements between HBs and RSLs should normally become a prerequisite for the bidding for major public sites (a partnership protocol is offered) and should be introduced, where possible, at the conception of a project.***

Conflict in the negotiation of agreements concerning the mix and specification of social/affordable housing would be substantially reduced if the housing provider and future manager were to reach agreement before the application was submitted rather

than when the resolution to grant had been made, subject to an unresolved Sect. 106 agreement.

### **5.1.3 Partnering**

***Recommend: for major or portfolios of sites, strategic partnering between HBs and RSLs, as described in the attached protocol (Appendix 5), should be introduced at the conception of a project.***

Agreement should be secured on land assembly, planning and Sect. 106 strategy, Master Planning and development appraisal, construction procurement and completed scheme management.

### **5.1.4 Local authority process integration**

***Recommend: The housing and planning policies and practices of LAs should be better integrated in the integration and specification of social/affordable housing prescribed in Sect. 106 agreements.***

Examples of disputes between different parts of an LA have contributed substantially to delay in planning decisions. The recommendations elsewhere in the report for strategic partnering will also improve and expedite negotiations on the provision of social/affordable housing.

### **5.1.5 Planning policy for social/affordable housing**

***Recommend: there should be greater clarity in government planning policy for social/affordable housing on what it is legitimate for local planning authorities to require.***

ODPM is currently reviewing guidance in this field and the evidence from discussions with practitioners and from the evaluation of agreements is that a wide and inconsistent approach to negotiations on Sect. 106 agreements pertains. Whereas it is appropriate to vary requirements to reflect different levels of housing need, the approach requires clearer guidance, including the extent to which the needs for affordable housing should be considered beyond those either on the council waiting list or those who do not fall within the current definition of key workers.

### **5.1.6 Public capital controls and regulatory constraints**

***Recommend: public capital controls and regulatory constraints should be eased further to enable less complex and more effective agreement structures to emerge quickly, increasing housing supply.***

These would deliver longer-term public share increases in land value, the benefits of deferred purchase to reclaim front-end costs and the reinvestment of receipts in the future achievement of Sustainable Community objectives.

***Recommend: a two-year ‘amnesty’ is recommended where LAs could reinvest 100 per cent of capital receipts from LSVT, ALMO, rights to buy and land sales back into mixed tenure/affordable homes initiatives.***

Reluctant LAs would be incentivised to substantially increase housing and accelerate the planning process.

## 5.2 Practice

### 5.2.1 Standard specification

***Recommend: the Housing Corporation, HBs and RSLs should be invited to review the specification requirements for social/affordable housing to increase flexibility and simplicity, but not at the expense of quality.***

A clear distinction between the standards for social rented and other forms of housing should be made, the former to reflect long-term maintenance obligations, the latter to reflect, as far as possible, market housing products.

### 5.2.2 Standard Sect. 106 clauses

***Recommend: central government should suggest model Sect. 106 agreement clauses to achieve social/affordable housing.***

Current reviews provide this opportunity.

### 5.2.3 Construction procurement

***Recommend: the newly issued ‘BE Collaborative’ construction contract should be used for all social/affordable housing schemes.***

### 5.2.4 Partnership programmes

***Recommend: longer-term HC (and EP) partnership investment programmes for both growth and market failure areas should be created. They would have the following features.***

- They would provide a guarantee of funding over at least a three-year period to a partnership between a House Builder and an RSL or RSLs within a specified geographical area. Both public and private sources of funding could feature.

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- The programme would specify a minimum number of units to be produced.
- They would specify standards, density, degree of social integration and the technology to be used.
- Preferably, local authorities would be party to such agreements, particularly to ensure that planning approval was rapidly achieved.

### **5.2.5 Community engagement and participation**

***Recommend: strategic partnerships of HBs and RSLs for larger-scale developments should engage the existing community in Master Planning and option evaluation, future development and future management on the basis of the JRF York and Bristol models.***

There is much evidence that the early engagement of the existing community reduces the time taken to secure consents and deliver housing.

## **5.3 Model Sect. 106 framework**

Appendix 6 provides a model framework for a typical Sect. 106 agreement.

## **5.4 Model clauses**

There are recommended model clauses in Appendix 7 as follows:

- mortgagee in possession exemption
- safeguarding shared equity tenants
- Expert Determination
- Master Planning
- affordable housing pricing formulae
- phasing
- Community Committee Constitution and remit.

## 6 Further work

The commission has been both challenging and informative. The speed with which the legislative and regulatory environment is changing means that this report is but a position statement. Nonetheless, a number of specific opportunities have emerged to take the initiative further.

### 6.1 Definition of social/affordable housing

Descriptions such as ‘intermediate market housing’, ‘shared equity’ or ‘shared ownership housing’, ‘key worker housing’, ‘social rented housing’, ‘discount rented housing’, ‘subsidised market housing’, ‘discount sale housing’ make the incorporation of definitions of social/affordable housing in development and Sect. 106 agreements, and in special purpose vehicle (SPV) structures, difficult.

*A clearer definition has been commissioned by ODPM.* Hopefully, it will address, as an example, ‘key worker housing’, which is perceived as solely for public sector workers such as teachers, nurses and the police. In many areas, workers in manufacturing and service industries are key to the sustaining of a prosperous economy and might be given equal weight to important public sector workers.

### 6.2 The ‘sustainability’ of affordable housing

Social housing for rent with statutory limits to rent increases secures this stock in an ‘affordable category’.

Shared equity schemes provide for increases broadly in line with house price inflation but, if the house prices continue to increase in disproportion to incomes, then problems will occur when individuals move on. Where 100 per cent of the equity is eventually acquired, the unit is removed from the affordable market.

Cut price/discount market homes eventually move back into the market.

***Recommend: HBs, RSLs, banks and building societies should be invited to consider long-term financing arrangements to sustain an affordable housing stock.***

### 6.3 Alternative NHS LIFT schemes

One of the most innovative and influential public–private partnership (PPP) models to emerge in recent years is that of the NHS Local Improvement Finance Trust (LIFT).

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This is a model that has attributes that are capable of being applied directly to other markets, particularly sustainable, affordable/social housing.<sup>1</sup>

LIFT arose from years of under-funding in health and social care in a primary and community setting, exacerbated by backlog maintenance and by facilities that failed to match changing demographics. The problem of delivering a successful solution was made more complex by the large number of diverse stakeholders each with differing funding sources. Bringing together these stakeholders that span the public sector (such as social services departments of local authorities, primary care trusts, NHS trusts), the private sector (such as third-party developers, GPs, pharmacists, nursing care providers) and the independent sector (local charities and other not-for-profit organisations) had always been an inhibitor in providing any procurement methodology that was sustainable.

The need (as expressed in the NHS Plan) was for 5,000 GP premises and 500 one-stop-shop primary care centres. In fact, the solution adopted was far more comprehensive and involved the following.

- The creation of a national joint venture company to deliver the project: Partnerships for Health (PfH), a joint venture (50/50) between the Department of Health and Partnerships UK.
- The establishment by PfH of 42 geographically defined LIFTs concentrating on areas where there was the greatest need.
- Each LIFT would establish a Liftco with mixed public and private equity to create a long-term partnership aimed at delivering sustainable facilities to meet the changing requirements of health and social care for the next 20 to 25 years.
- The partnership would focus on long-term value for money through effective supply chain management, harnessing the best from the private sector and ensuring both had a joint commitment to a sustainable relationship.
- The capital value of the investment, based on Department of Health (DoH) estimates of £100–150m for each LIFT, is £4–6bn over the next five years. Over the 20 years' life of the partnership, the investment will be significantly greater.

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1 Indeed, NHS LIFT has been influential in a number of other government initiatives to centrally manage capital investment: modernising schools through the 'Building Schools for the Future' programme being the most topical. This programme is planned to invest upwards of £20bn in new schools over the next five years.

Bevan Ashford advised PfH on the overall commercial structure, procurement methodology, regulatory framework and the creation of nationally implemented generic documentation. Bevan Ashford also acts for 17 of the local LIFTs including the pathfinder first wave schemes. The first scheme (City and East London) was closed in a record 13 months from notice in the Official Journal of the European Communities (OJEC) to financial close.

Some of the key attributes of LIFT that can be applied to sustainable affordable/ social housing include the following.

***Potential to share in residual value***

This was an issue recognised early in structuring NHS LIFT. There is a balance between incentivising the private sector to recognise residual value to reduce the rental charged to the public sector (within the context of social housing, this is likely to mean a reduction in the element of public sector subsidy) and allowing the private sector a windfall gain (represented in the context of social housing in terms of creating a long-term sustainable stock).

In part, this was addressed by a 40 per cent equity share to the public sector (20 per cent to the local Primary Care Trusts and 20 per cent to Partnerships for Health), allowing the public sector to share in any enhanced residual value. More specifically, it was addressed by incentivising the private sector bidder (through the competitive procurement process) to maximise residual value and to the extent that the actual residual value was higher than predicted, including 'reverse overage' whereby the enhanced value was shared at the end of the concession period between the public and the private sector in accordance with an agreed formula.

Applying this to the context of social housing, this would allow residual value to migrate towards changing needs while preserving the overall value for public sector purposes.

***Complexity of requirements***

One of the key challenges of delivering a successful procurement for the NHS was to address the large number of multiple stakeholders each with their own diverse funding streams, probity requirements and separate approval processes.

In part, this was addressed by the creation of public sector equity: stakeholders sharing in the benefits of a successful common agenda. Bringing together these multiple stakeholders was further enhanced through the creation of a Strategic Partnership Board (SPB) – a board that was public sector controlled setting the long-term strategic agenda for the public sector. The Board brought together what NHS

LIFT called the 'Participants' (the key stakeholders involved in funding the process – principally, primary care trusts and local authorities) who would then co-opt other stakeholders such as local GPs, pharmacists, strategic health authority as the need arose, recognising their separate respective strengths and contribution.

The SPB creates an effective public sector forum for managing the public sector issues (see below), ensuring that it has a fit within the strategic objectives of each of the stakeholders.

### ***Short-term approval***

The creation of long-term sustainable affordable/social housing requires separation between long-term planning and short-term approval. Within NHS LIFT, this was achieved through the SPB taking ownership of the public sector strategic vision through a Strategic Services Delivery Plan (SSDP) – a plan that was aimed at requirements of the Participants for the next ten years. That plan would recognise specific facility requirements over the early years, becoming more macro in its outlook as the time span lengthened. What it allows is:

- a common ownership of a strategic vision between not only the public sector stakeholders but also the procurement vehicle, Liftco
- a commitment from both sides to commit resources to deliver on that vision; it is significant to note that Liftco would be required to defray a significant portion of its costs in entering into the overall framework contract, with those costs recouped only on successful conclusion of future facilities.

Through separating planning from approval, the approval process becomes a matter of pure delivery, with the shared vision in the SSDP already having been jointly owned by the individual approval bodies.

## **6.4 Sustainable Community performance indicators/ guidelines**

Customer expectation and satisfaction is an early parameter of market housing but continues to be important following the completion of a scheme. Indicators such as educational attainment, the reduction of crime and vandalism could be developed for new and existing mixed tenure housing as outputs for grant over the long term, although all will eventually be reflected in land and property values.



EP's proposed review of the Urban Design Compendium would also help in specifying design requirements.

***Recommend: consideration should be given to the introduction of Sustainable Community performance indicators in partnership agreements and delivery structures.***

# Appendix 1: List of documents

Developments in respect of which documents have been considered include the following.

## 1 Ipswich

LA owns allocated land.

- Seeks partners to procure infrastructure.
- Partner is residential developer.
- Special provisions to ensure balance on an annual basis between infrastructure costs incurred and value of land released to avoid a clash with Local Authority Finance Rules.

*Commentary: while these rules create some fairly artificial commercial arrangements, they have worked well in practice.*

## 2 York

LA owns allocated land that it wishes to develop 'in accordance with twenty-first century good housing practice'.

- The Joseph Rowntree Housing Trust (JRHT) is the selected developer to procure planning and installation of infrastructure in accordance with its overall charitable objectives, which are related to the provision of good housing.
- Interesting structure for community involvement.
- JRHT develops affordable housing and sells open market housing on an open market basis.
- Open book accounting and profit sharing.

## 3 Dursley

RDA has regeneration aims in the broadest sense. Wants remediation, job preservation, housing development in accordance with Sustainable Community Plan provisions.

Provisions for development of Master Plan take into account the RDA's well-developed policy on sustainable development with provisions for:

- development partner procures remediation infrastructure regarding provision of employment uses and agrees to procure sales of designated residential plots on the open market
- open book accounting and profit sharing
- phasing of infrastructure and disposals to ensure sensible balance of expenditure against predictable receipts.

#### **4 Telford**

- Publicly owned (EP) site. Substantial (200-acre) site to create 'Urban Village'.
- Private sector partner is charitable body with developer and RSL arms.
- Basic structure very similar to Dursley but with formal steering committee structure to take matter forward and obligation on public sector to contribute to project expenditure on a 50/50 basis, with proceeds being shared on the same proportion.
- While no SHG funding is implicit in the scheme, private sector partner obliged to seek such grant aid as possible to set off against development expenditure.

#### **5 North London**

Local authority owns flatted development of 500 units.

- Site substantially obsolete.
- LA consults and ballots tenants on the proposals for the phased demolition and reconstruction of a mix of affordable and open market homes.
- Site transferred at valuation (nil).
- Private Sector Finance used to buy back flats previously sold under right to buy.
- Private Sector Partner is RSL with development arm.

- Bank borrowing funds – initial construction works with pay back from rental sales of open market units and receipts from right to buy sales.

*Commentary: the lower return requirements of the RSL mean that the whole scheme could be funded on the basis of an 18-year payback with the prospect of earlier payback if land values and rentals increased because of the success of the regeneration. (Similar projects have been successfully carried out where there is a consortium agreement between the housing association and developer.)*

## 6 Edinburgh

Essentially, a framework agreement with grant funding available whereby local authority and RSL co-operate in identifying sites for regeneration in accordance with RSL design standards and estate management provisions. This is a sensible provision for community consultation.

*Commentary: this is an interesting, overarching arrangement. Multi-site partnering arrangements are not dissimilar to the LIFT concept for NHS primary health care in England.*

## 7 Glasgow

Council estate requires regeneration.

RSL and residential developer co-operate (with the assistance of grant funding and RSL borrowing on normal modelling assumptions).

## 8 West London

Private sector initiative in the identification of scope for regenerating council-owned estate. Estate not identified as high priority for investment by the council.

HB and RSL co-operate in the development of the proposal for mixed tenure redevelopment together with new shop, new community centre. Creation of new and better managed private and public realm areas.

*Commentary: this scheme demonstrates the scope for RSLs and house builders to work co-operatively.*

## **9 Building agreement – South London**

Co-operative arrangement between two RSLs and house builder to procure the urban renewal of large South London housing estate.

Document reflects provisions commented on in Schedule 4 to this Agreement.

## **10 Sect. 106 agreements**

Sect. 106 agreements relating to developments in Bristol, Blandford Forum, Swindon, Taunton and Melksham. These agreements related in the main to residential schemes. The provisions worthy of comment have been drawn out in the model clauses and in general comments on the manner in which they provide for the pricing specification and construction of affordable housing.

The Taunton agreement also contained an agreement by the LPA to use CPO powers (subject to indemnity) to acquire land for access.

The other commentaries/documents considered mirrored one or other of the documents briefly referred to in this Schedule.

*Commentary: in addition to the full agreements seen, a number of comments have been received on specific clauses in others that have not worked well in practice.*

# Appendix 2: List of consultees

## Agreement and intelligence contributions

- Bellway Homes
- Bevan Ashford
- Bovis Homes
- Countryside Partnerships
- Hyde HA
- London and Quadrant HA
- Metropolitan Housing Trust
- NE NHS Health Authority
- Silbury Group (was Sarsen HA)
- Sovereign HA
- Southern HA
- Westbury Homes

# Appendix 3: Social/affordable housing standards

- JRF Mixed Tenure Agreements
- HC Scheme Development Standards
- HC Capital Funding System Procedure Control
- HC Good Practice Guide
- National Housing Federation Standards and Quality in Development
- Roof Spaces
- C 120/74 and 2/74 Mobility Standards
- JRF Lifetime Home Standards
- BRE Ecohomes
- ODPM Housing and Energy Efficiency Leaflet 72
- Building Regulations, especially Noise/Structures
- Secured by Design
- NHBC/Zurich ten/12 year standards
- Planning Consent
- Adoption of Roads and Sewers
- CIB Considerate Constructors Scheme
- HC/BRE Housing Quality Standards
- British Standards/Code of Practice
- Modern Methods of Construction (MMC)/Off-Site Manufacture (OSM)
- EP Millennium Community Standards

# Appendix 4: Comparison of existing forms of contract

<p><b>JCT Standard Form of Building Contract, 1998 edition with Contractor's Design</b></p> <p>The contract contains no express partnering obligations and is entirely traditional in its approach.</p>	<p><b>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</b></p> <p>The requirement for the parties to act 'in a spirit of mutual trust and co-operation' appeared radical when launched in 1992 but is now accepted as mainstream.</p> <p>New Partnering Agreement (Option X12) seeks to convert existing ECC contracts into separate partnering contracts. However, only 'Partners' (i.e. those whose contract is subject to a Partnering Agreement) are eligible to form the 'Core Group' to guide the progress of the project. Only Partners must share information with each other and may agree key performance indicators in relation to their performance.</p>	<p><b>Association of Consultant Architects Project Partnering Contract (PPC 2000)</b></p> <p>This is a multi-party contract between client, design team, 'Constructor' and any specialist subcontractors involved from the outset.</p> <p>It contains extensive partnering obligations including the pursuit of six partnering objectives and ten partnering targets (clauses 4.1 and 4.2). The partnering targets are unlikely to be achieved without some compromise between them.</p> <p>A 'Core Group' comprising representatives of the signatories to the PPC 2000 Contract drives the delivery of the project with provision to change membership as the project progresses.</p>	<p><b>'BE Collaborative' Contract</b></p> <p>There is an 'Overriding Principle' that parties must act collaboratively. Failure to observe this Overriding Principle can be taken into account by any adjudicator or judge when considering any dispute under the contract.</p> <p>A 'Project Team' comprising the client, designers, the main contractor and any specialist subcontractors considered important to the delivery of the project is formed to provide a similar role to that of the Core Group under the PPC 2000 Contract.</p> <p>There is an obligation for Project Team members to draw up a 'project protocol' intended to set out, in their own words, their objectives for the project and the development of their</p>
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## Appendix 4: Comparison of existing forms of contract

<p>JCT Standard Form of Building Contract, 1998 edition with Contractor's Design</p>	<p>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</p>	<p>Association of Consultant Architects Project Partnering Contract (PPC 2000)</p>	<p>'BE Collaborative' Contract</p>	<p>relationships during it. This should be prominently displayed on site and their places of work. It is designed to give the project team a sense of shared commitment to the success of the project but is expressly made non-legally binding in order to prevent any conflict with the contract terms.</p>
<p>2 Allowing adequate time for preparation by contractor and any key specialists</p>	<p>The JCT Contract is traditionally used in situations where a swift start on site is made following a tender and contains no provisions dealing with early engagement prior to construction.</p>	<p>The NEC Contract is also drafted on the basis that it deals with the construction period but not with any pre-construction period.</p>	<p>The PPC Contract is drafted on the basis of distinct pre-construction and construction stages with the commencement of the construction stage being conditional on the prior satisfaction of 12 pre-conditions set out in clause 14.</p> <p>The contract does therefore envisage early engagement of contractor and key specialist subcontractors prior to commencement on site</p>	<p>The 'BE Contract', by virtue of its drafting as a Purchase Order and separate <i>Collaborative Terms</i>, is capable of use for a two-stage engagement of a main contractor by completing separate Purchase Orders for the Stage 1 services (pre-construction) and Stage 2 (construction). This approach is recommended in the accompanying Guidance to the contract.</p>

	<p>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</p>	<p>Association of Consultant Architects Project Partnering Contract (PPC 2000)</p>	<p>‘BE Collaborative’ Contract</p>
<p>3 Allocation of risks and risk management</p>	<p>JCT Standard Form of Building Contract, 1998 edition with Contractor’s Design</p>	<p>so as to allow adequate time for pre-planning of the construction stage.</p>	<p>The allocation of risks between the parties to each contract (this is most likely to be used primarily in the contract between the client and the contractor) should be agreed on a project-by-project basis and set out in the ‘<i>Risk Allocation Schedule</i>’. The parties have complete flexibility as to the allocation of both the cost and time consequences of each identified risk between them on a percentage basis. Alternatively, the Risk Allocation Schedule could be fully completed in advance with a prescribed allocation of risks by the client (albeit that such an approach goes against the collaborative principles of the contract).</p>
	<p>The JCT Contract sets out a number of separate ‘<i>relevant events</i>’, which entitle the contractor to apply for an extension of time and/or ‘<i>direct/loss and/or expense</i>’ respectively.</p> <p>This allocation of risks is fixed.</p> <p>There are no provisions requiring the parties to carry out any active risk management in relation to the project.</p>	<p>The PPC Contract requires the contract parties ‘<i>together and individually</i>’ to work through risk management exercises to identify risks and their likely cost, eliminate or reduce risks, insure risks wherever affordable and appropriate, and to share or apportion risks ‘<i>according to which one or more Partnering Team members are most able to manage such risk</i>’.</p> <p>However, the contract does not appear to reflect any sharing or apportioning of risks. Rather, clause 18.3 sets out a list of 15 fixed risks, which entitle the contractor to an extension of time. As with the NEC contract, there is</p>	<p>The NEC Contract sets out a list of risks borne by the client, with provision to add to this list by agreement. All other risks are carried by the contractor and each party indemnifies the other against ‘<i>claims, proceedings, compensation and costs due to an event which is at his risk</i>’.</p> <p>In addition, the contract sets out 18 ‘<i>compensation events</i>’ (which include the occurrence of one of the client’s risks referred to above), which entitle the contractor to apply for an extension of time and/or additional payment. The ‘<i>Project Manager</i>’ decides the contractor’s entitlement to additional time or cost based either</p>

## Appendix 4: Comparison of existing forms of contract

<p>JCT Standard Form of Building Contract, 1998 edition with Contractor's Design</p>	<p>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</p>	<p>Association of Consultant Architects Project Partnering Contract (PPC 2000)</p>	<p>'BE Collaborative' Contract</p>
<p>on a quotation he has received from the contractor (which he accepts) or from his own assessment.  There are no provisions requiring the parties to proactively identify and manage risks, either individually or collectively.</p>	<p>provision for additional risks to be specified. From the date of commencement of the works, the contractor is responsible for managing all the risks associated with the project (unless otherwise stated by an amendment to the PPC Contract). There is no clear responsibility for managing risks prior to the commencement on site.</p>	<p>The completion of the Risk Allocation Schedule brings into clear focus:</p> <ul style="list-style-type: none"> <li>• what the risks to the project as a whole are</li> <li>• what can be done to remove or mitigate those risks</li> <li>• a relatively scientific allocation of the costs associated with those risks, either as part of the contractor's target cost or as part of the client's budget contingency.</li> </ul>	<p>The contractor is entitled to apply for an extension of time and/or additional payment to compensate for the effect of any '<i>Relief Events</i>', which comprise:</p> <ul style="list-style-type: none"> <li>• variations to the works</li> <li>• client breaches of the contract</li> <li>• the occurrence of risks referred to in the Risk Allocation Schedule to the extent</li> </ul>

<p>JCT Standard Form of Building Contract, 1998 edition with Contractor's Design</p>	<p>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</p>	<p>Association of Consultant Architects Project Partnering Contract (PPC 2000)</p>	<p>'BE Collaborative' Contract</p>	<p>that the consequences of the occurrence of those risks is not already allocated to the contractor under the Risk Allocation Schedule</p> <ul style="list-style-type: none"> <li>risks not referred to in the Risk Allocation Schedule and which were not reasonably foreseeable and are beyond the control of the contractor (excluding sub-contractor defaults).</li> </ul> <p>In addition, all parties are required to join in the identification and management of risks by way of a 'Risk Register'. Either they may be specifically asked to contribute or, if they have relevant information to contribute, they are directed to do so. One party will be made responsible for actually preparing and updating the Risk Register</p>
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## Appendix 4: Comparison of existing forms of contract

	JCT Standard Form of Building Contract, 1998 edition with Contractor's Design	The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)	Association of Consultant Architects Project Partnering Contract (PPC 2000)	'BE Collaborative' Contract
4 Requirement for open book accounting	The contract is based on a lump-sum price with two alternative methods for payment (stage payments or monthly valuations). There are no provisions for payment by reference to a target cost on an open book basis.	Option C provides for payment by reference to a target cost, the contractor being paid by reference to his 'Actual Costs'.	The detail of any target costs arrangements are to be separately drafted by the parties and included in the 'Price Framework'. However, the contract contemplates payment on an open book basis with separate allocations of 'Profit', 'Central Office Overheads' and 'Site Overheads'. The contract also provides for an 'Agreed Maximum Price', which should be established during the pre-construction stage at a figure within the client's budget for the project.	throughout the period of the contract. The 'BE Contract' has alternative payment provisions, either by reference to a lump sum price or by reference to a target cost (subject to a 'Guaranteed Maximum Cost'). The target cost option is recommended in the contract Guidelines when engaging contractors. Full details of the payment provisions are set out in the Collaborative Terms with an appendix to the Purchase Order setting out the framework for inserting the necessary figures.
5 Involvement of a contractor's supply chain	The JCT Contract has no provisions dealing with the involvement of subcontractors.	The NEC Contract contains no specific provisions regarding the involvement of the contractor's supply chain.	The PPC Contract does recognise the importance of supply chain involvement at least to the extent that key specialist subcontractors	The 'BE Contract' contains provision for key members of a contractor's supply chain to be identified and recorded in his contract. The

<p>JCT Standard Form of Building Contract, 1998 edition with Contractor's Design</p>	<p>The NEC Engineering and Construction Contract – Option C: target contract with activity schedule with the NEC Partnering Agreement (Option X12)</p>	<p>Association of Consultant Architects Project Partnering Contract (PPC 2000)</p>	<p>'BE Collaborative' Contract</p>	<p>contractor agrees to 'work together with and fully involve' the named supply chain members (and any other subcontractors appointed during the course of the project in the carrying out of the works and further agrees to 'organise or take part in team building, project planning, risk and value engineering workshops involving all or relevant members of its Supply Chain and other Project Participants as necessary or appropriate to the stage of the Project' (clause 3.10).</p>
<p>are contemplated as signatories to the main contract and any subcontracts subsequently entered into are to be on an open book basis 'to the maximum achievable extent'.</p>				

# Appendix 5: Partnership agreement protocol

## **A protocol for strategic, long-term joint action in the delivery of social/affordable housing**

This is a protocol between a working group of major house builders (MHBs) and registered social landlords (RSLs.) They seek to deliver more housing and more social/affordable housing to support the policies of the Sustainable Communities Plan. Their rationale is as follows:

- Strategic Partnering, backed by long-term funding commitments, offers the best prospect of securing an early and significant increase in the supply of social/affordable housing.
- An increase in volume of social/affordable housing will provide the conditions for improvements in productivity, including those achieved through modern methods of construction/OSM.
- Government intervention and investment in associated education, health, community and transport facilities and in land assembly, if focused on large-scale housing releases, will be more effective in creating sustainable communities.
- Certainty of government funding for longer programmes would achieve economies of scale, cost stability, improvements in quality and the facility to negotiate Sect. 106 agreements in a shorter timescale, whether on public or private land.
- Strategic Partnering provides the opportunity to increase standardisation with benefits of cost stability and improvements in quality without compromising design quality.
- Strategic Partnering recognises the commercial skills of MHBs and the long-term management skills of RSLs adding value through co-operation.

This protocol is based on the concept of flexible long-term Strategic Partnership Agreements (SPAs), typically between an individual MHB and an RSL, although a consortium approach may be required for larger areas. Although maximum potential would be realised if Social Housing Grant and Gap Funding were released over longer project timescales with more flexibility in Joint Commissioning arrangements, the protocol can operate within existing arrangements.

## Mixed tenure agreements

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The members of the working group have extensive experience of joint working and they are confident that the protocol will result in an immediate improvement in the delivery of new housing and new social/affordable housing. It is a logical extension of existing working practices and is based on the early selection of respective HB and RSL partners in the scheme process.

Which will deliver the following.

- *Speed*: a reduction in the timescale between identification of a project and delivery.
- *Cost-effectiveness*: maximising the use of public funds and private investment.
- *Quality*: in design, sustainability and management.
- *Continuous improvement*: in both product and process.

The SPA supported by a business plan will typically set out the following.

- 1 Area of operation programmes and target numbers/tenure mix.
- 2 Integrated structure to liaise with the local authority and other public bodies.
- 3 Management arrangements for feasibility, project, development and completed scheme.
- 4 Land assembly.
- 5 Master Planning and viability.
- 6 Planning and Sect. 106 agreements.
- 7 Construction procurement.
- 8 Funding, tax and financial management arrangements.
- 9 Agreed returns and profit share arrangements.
- 10 Communications and consultations.
- 11 Performance and wind-up arrangements.



The SPA will cover and link together a range of land opportunities including:

- affordable housing provided through Sect. 106 agreements
- opportunities for new housing arising from stock transfers
- public sector land disposals.

The parties to an SPA will work together, including, where appropriate, sharing costs, to bring forward a range of projects, forward funding and land banking in a particular area as necessary. Partners will focus on high density, mixed use and mixed tenure developments.

Different organisational structures will be appropriate for different types and sizes of projects. The SPA will allow for a range of structures including the following.

- *A Collaboration Agreement:* likely to be used on smaller projects including those arising from Sect. 106 agreements.
- *A Consortium Agreement:* likely to be used for larger projects with a longer time frame. It will set out in more detail how the partners will interact, processes for decision making, the project team, funding, financial, management and quality control arrangements.
- *Incorporated Structures:* a Special Purpose Vehicle with a separate legal structure normally applicable only for the largest long-term projects.

With the emphasis on brownfield sites and the growing importance of high-quality bespoke design solutions, the working group does not consider standard house types will always be relevant. Improved joint working, quality and cost savings, however, can and will be achieved by parties to an SPA developing:

- standardised specifications
- standardised construction details
- standardised kitchen and bathroom layouts
- the use of modern methods of construction
- bulk purchasing and partnering supply chains

## Mixed tenure agreements

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- procurement protocols
- generic building and other legal agreements.

Additionally, the SPA will allow for and encourage the creation of, and continued use of, teams of consultants. Individual projects demand individual responses. The above measures, while not inhibiting the necessary flexibility, will promote the benefits in costs, quality and working practices envisaged in the 'Rethinking Construction' agenda.

The working group has reviewed the range of standards applied to housing and social/affordable housing. Parties to an SPA will agree how these standards are implemented in each project. A clear distinction between the requirements applying to social rented and intermediate market housing has been identified. The working party agrees that there can be more flexibility in the design and specifications adopted for intermediate market homes.

The parties' overarching objectives are likely to be expressed in Design Guides within the SPA. A range of Housing Quality Indicators (HQIs) and Key Performance Indicators (KPIs) will allow effective monitoring of performance. Their development over the life of the SPA will provide support for a process of continual improvement.

The emphasis will always be on quality, both for individual homes and in the spaces between buildings. This emphasis will take into consideration not only fitness for purpose and appearance, but also sustainability, lifetime costs and future management and maintenance. A prerequisite of design solutions will always be the achievement of tenure blind projects.

Close and early liaison with the local authority is a given commitment by the parties to the SPA. The proportion of different tenures will be assessed on a project-by-project basis in liaison with the local housing authority and Regional Housing Boards. It will take into account robust assessments of housing needs considering the totality of all housing needs and demands together with an analysis of the tenure characteristics of the area. The integration of other uses and the facilitation of associated community, education, health and transport facilities will feature strongly in any agreement, to ensure that Sustainable Community objectives are met.

Entering into an SPA presupposes the parties will commit the required funds to achieve the agreed outputs. The flexible structure envisaged allows the demands of individual projects to inform the agreed response. Key principles to be included in the SPA are likely to cover:

- the availability and extent of grant
- the availability of funds to provide major infrastructure requirements
- how and when cross-subsidy models are to be used
- the use of Recycled Capital Grant Fund (RCGF) and other appropriate receipts
- service charge issues
- the management of cash flow
- the treatment of risk and reward.

Ongoing management, especially of high-density schemes, is an important issue – for the RSL, given its responsibilities to occupiers, and, for the MHB, as the success of a scheme over time is one of the best advertisements there is. It is entirely appropriate, therefore, for the SPA to include the main management principles and structures to be followed. As a basic principle, all occupiers, whatever their tenure, should enjoy the same rights and share the same obligations. There should be a single overall management structure.

Issues around the level of service charges and the allocation of properties have been identified as important to long-term sustainability, requiring the input and action of others. As an example, the low level of child density and under-occupation of dwellings are common in high-density, market-sale projects and are generally accepted as reasons why such schemes are successful over time. Different approaches will be required for higher-occupancy, rented, social housing projects.

## **Summary**

A Strategic Partnering Agreement between an HB and an RSL will provide an optimum arrangement for an increase in the supply of housing and social/affordable housing within a sustainable community, through long-term commitments, achieving more together than independently.

# **Appendix 6: Sect. 106 planning agreement – model framework (housing developments)**

## **Standard provisions**

- Identification of subject land.
- Linkage with commencement of development.
- Dispute resolution: expert determination or arbitration.
- (Where applicable) linkage with development brief principles (in particular, phasing and sustainability of design).

## **Affordable housing**

- Timing or provision (i.e. phasing).
- Specifications.
- Pricing mechanism.
- Long-stop provisions (no demand by an RSL).
- Mortgagee in possession provision.
- Rental/staircasing terms.
- Linkage with local housing needs/occupancy/key worker.

## **Education contribution**

- Phasing.
- Bonding.

## **Amenity areas/open space**

- Phasing.
- Bonding.
- Long-term maintenance provisions.
- Specifications.
- Off-site contributions.

## **Infrastructure (highways/drainage/footpaths)**

- Phasing.
- Bonding.
- Off-site works contributions.

## **Community facilities**

### **Public transport contribution**

The headings in this framework apply to unilateral undertakings save for infrastructure that is likely to be beyond their scope.

# Appendix 7: Model clauses

This appendix provides model clauses from existing agreements which are offered as best practice examples.

## 1 Short form mortgagee in possession clause

The obligations contained in this Deed shall not bind a mortgagee of a Housing Association of the Affordable Housing Land or any part thereof or any receiver appointed by such mortgagee or chargee and in the event of such mortgagee or chargee (or their appointed Receiver) becoming a mortgagee or chargee in possession the said obligations shall thereafter cease to have effect in relation to the Affordable Housing Land (or such part thereof as may be affected).

## 2 Long form mortgagee in possession clause

Subject to and without prejudice to the powers and requirements of the Housing Corporation under the Housing Act 1996 that in the event of a default under any security referred to in Clause [ ] clause [ ] shall not prevent the sale of the freehold of the Red Land or of any social housing unit by the chargee or mortgagee in the exercise of its power of sale provided that the chargee or mortgagee shall have first followed the procedure set out in clause [ ].

That the procedure referred to in Clause [ ] shall be as follows.

The chargee or mortgagee shall give not less than three months' prior notice to the Council of its intention to exercise its power of sale to enable the Council to secure the transfer of the Red Land to another Registered Social Landlord or to the Council.

The Council shall then have three months from the notice given pursuant to clause [ ] within which to respond indicating that arrangements for the transfer of the Red Land can be made in such a way as to safeguard the social housing character of the Red Land and of any dwelling.

If within the three months the Council does not serve its responses to the notice served under clause [ ] then the chargee or mortgagee shall be entitled to exercise its power of sale free of the restrictions set out in clauses [ ] inclusive.

If within three months of the date of receipt by it of the notice served under clause [ ] the Council serves its response indicating that arrangements can be made in accordance with clause [ ] then the chargee or mortgagee shall co-operate with such arrangements and use all reasonable endeavours to secure such transfer.

The Council shall in formulating or promoting any arrangements referred to in clauses [ ] and [ ] give full consideration to protecting the interest of the chargee or mortgagee in respect of monies outstanding under the charge or mortgage and other duty of the chargee or mortgagee to secure a proper price in exercising its power of sale.

If the Council or any other person cannot within nine months of the date of service of its response under clause [ ] secure such transfer then provided that the chargee or mortgagee shall have complied with its obligations under clause [ ] the chargee and mortgagee shall be entitled to exercise its power of sale free of the restrictions set out in clauses [ ] and [ ].

If the chargee or mortgagee does not wish to exercise its power of sale at any time after the giving of notice under clause [ ] or the Council does not wish to continue with the exercise of its powers under clause [ ] after the giving of its response under clause [ ] that party shall give to the other not less than seven days' written notice of its intention to discontinue.

In the event of the chargee or mortgagee exercising its power of sale the Owner shall pay to the Council no later than 14 days after the date of any such sale the whole amount of any grant or loan made by the Council in respect of the Red Land pursuant to the Housing Act 1996 Sect. 22 insofar as the proceeds of sale are sufficient after deduction of the sum due to and outstanding to the chargee or mortgagee at the date of sale in respect of the principal amount of any loan secured on the Red Land and interest thereon and charges properly incurred.

That in the event the Housing Corporation exercises its right to require payment of social housing grant made in respect of the Red Land in accordance with the Housing Act 1996 Sect. 27(2) the Association shall pay to the Council on the date upon which the payment of social housing grant falls due in accordance with the Housing Corporation's direction the whole amount or any grant or loan made by the Council pursuant to the Housing Act 1996 Sect. 22 together with interest thereon in respect of the Red Land.

Without prejudice to the provisions of clauses [ ] to notify the Council immediately in the event of service of any notice under the Housing Act 1996 Sects 40 and 41, or under any notice order or direction served made or given under the Housing Act 1996 Schedule 1 Part IV.

### **3 Provision required to safeguard shared equity tenants**

For the avoidance of doubt in the event that a leaseholder of an Approved Lease of one of the Shared Ownership Dwellings has completed the purchase of the freehold reversion pursuant to its right to staircase under the Approved Lease the provisions of this schedule shall with effect from completion of such purchase cease to apply to such one of the Shared Ownership Dwellings.

### **4 Specialist clauses**

#### ***'Expert Determination'***

It is generally felt that reference to Expert Determination is a more effective method of dispute resolution than arbitration or reference to the Court. It is important to make sure that the references are to an appropriate expert. The following clause aims to achieve proper process and reference to the proper expert.

- Clause -.1 In this Agreement where an issue in dispute is required to be determined it will be submitted for determination to an expert as follows.
- 1.1 The expert is to be appointed jointly by the Parties, or, if they cannot agree on the appointment, appointed by the President (or other) acting senior office for the time being of the relevant professional body on the request of either party.
  - 1.2 A person so appointed is to act as an expert and not as an arbitrator.
  - 1.3 Each Party shall be entitled to submit to the expert representations within ten working days of his appointment and cross-representations within a further ten working days in each case with such supporting evidence as such party considers necessary. Copies of such representations and cross-representations shall be served on the other party at the same time as the expert. The expert shall be directed to have regard thereto in making a decision, which the expert shall be instructed to deliver in writing (with reasons) within a further ten working days.
  - 1.4 The fees and expenses of the expert including the cost of his nomination are to be borne equally by the parties who (unless they otherwise agree) must bear their own costs with respect to the determination.
  - 1.5 The decision of the expert shall be final and binding except for manifest errors.



- Clause -2 For the purposes of -1.1 the relevant professional body is:
- 2.1 in relation to interim and final reconciliations, the project expenditure account and calculation of overage under clause [ ] of the Institute of Chartered Accountants in England and Wales
  - 2.2 in relation to any valuation aspects of this Agreement the Royal Institution of Chartered Surveyors
  - 2.3 in relation to the engineering aspects of the works the Institute of Chartered Engineers
  - 2.4 in relation to matters relating to variation of the Master Plan, the form of any planning application or planning agreement or any appeal proceedings, the Royal Town Planning Institute
  - 2.5 in relation to legal interpretation of this Agreement or any dispute not covered by clauses -2.1 to -2.4 inclusive, the Law Society.

## 5 Settlement of Master Plan

In the body of this report, we recommend settlement of the Master Plan prior to entering into the Joint Venture Agreement. Where that is not possible, it is necessary to define what a Master Plan is intended to be and provide a programme for its settlement. The clause provides, in effect, for this to be a deadlock matter not capable of resolution by reference to an independent third party. If, however, the parties are happy for such determination, the previous clause should be referred to.

‘The Master Plan’ means a scheme for the development of the site determined in accordance with Clause [ ] which for the avoidance of doubt shall identify Residential Plots, Commercial Plots, Land for Infrastructure and public realm and this statement of key development criteria based *[herein insert description of the public sector bodies policy statement relating to the creation of Sustainable Communities]*.

### **Clause**

- 1 The Developer shall within [ ] days hereof produce a draft Master Plan for approval by the Agency.
- 2 The Agency shall as soon as reasonably possible and in any event within [ ] days from the date of this Agreement either approve such draft or give reasons for not doing so.

## Mixed tenure agreements

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- 3 If the Agency has refused approval the Developer shall as soon as reasonably possible and in any event within [ ] working days of such refusal, submit a revised draft Master Plan to the Agency taking into account the comments of the Agency.
- 4 If the Agency refuses to approve such revisions within ten working days of receipt and the parties (having used all reasonable endeavours so to do) fail to agree the form of the draft Master Plan either party may determine this Agreement by serving written notice on the other, such notice to come into effect 20 working days after service whereupon the Developer shall forthwith be entitled to the payment by the Agency to it of a sum not exceeding £[ ] subject to provision of evidence of expenditure in preparation of the Master Plan pursuant to this Clause as a contribution towards its costs.
- 5 Following the approval of the form of the draft Master Plan the Developer shall offer the same for consultation for a period of eight weeks (consultation is a defined term requiring consultation with the general public).
- 6 Following consultation the Developer shall consider any representations made and within 20 working days of the conclusion of consultation shall present to the Agency for approval any amendments to the draft Master Plan it reasonably considers fit and the developer shall provide a written commentary on the representations made for justification of the manner in which those representations are or as the case may be are not reflected in the amendments made to the draft Master Plan.

## 6 Pricing mechanisms

The main body of the report recommends that clear guidance should be developed on what an RSL should be charged for units of affordable accommodation to be built and provided by a House Builder subject to Sect. 106 provisions. It may be that those prices would vary depending on whether the houses were being built for shared ownership or for rent but we set out below two possible clauses that could be used in Sect. 106 Agreements or indeed consortium agreements:

- 'Affordable Price': means a price of no more than three times plus 5 per cent of the household income of those households identified as Households in Local Housing Need in an up-to-date Housing Need Survey approved by the Council *provided that* each be revised at six-monthly intervals from the date of this Agreement in accordance with the monthly increase if any in 'labour market trends' average earnings index published by the Office for National Statistics. The relevant price with effect from the date hereof is £[ ].

- ‘Internal RSL Site Price’: means the payment to be made by RSL for the dwellings to be constructed in satisfaction of the Affordable Housing Requirements being an amount equal to £[ ] (‘or such other sum determined from time to time by the [Steering Committee] as may be required in order to ensure the repayment of a loan equivalent to the RSL Site Price by equal instalments covering principal and interest over a period of 25 years can be made by RSL out of the rents charged for the dwellings to be constructed in satisfaction of the Affordable Housing requirements after deducting management and maintenance costs and making an allowance for voids and bad debts, such items to be determined having regard to the guidance given to the RSL and issued by the Secretary of State for the Environment Transport and the Regions, the Housing Corporation, the Charity Commission or HM Treasury’).

NB: It is possible that this clause could be improved by giving guidance as to the level of interest to be used in the formula. Further, the parties could consider dictating hypothetical management costs and void costs as a percentage proportion of rental income. Similarly, the basis for establishing the rents to be used in the formula could be described.

## **7 Phasing**

In the context of a Development Agreement between a public sector landowner and private sector developer, there will usually be provisions for settling a programme for the carrying out of remediation and infrastructure works that seeks to tie in those works with the release of land for development, either by the private sector partner or following an open market sale by a third-party developer. What we are setting out below is a set of provisions designed to allow a sensible variation of that programme where the development land released by a phase of works has not provided sufficient income to merit the investment. In the wording below, A means the Developer and B means the Landowner Partner.

‘Clause-. The programme for carrying out Works within Works phase may be varied in the following manner.

- .1 Either party may by service of written notice on the other postpone the carrying out of the next works phase where:
  - (a) the revised project appraisal as approved demonstrates a deteriorating cash flow for the project compared with the original or the previous revised and approved project appraisal;
  - (b) in the opinion of the Agents appointed to market the development parcels the consideration for the development parcel likely to be

released for development and sale by the carrying out of the further Works is likely on balance of probabilities to be less now than the income from the works phase shown in the revised project appraisal or take longer to materialise;

- (c) the outstanding principle of any loans raised by A to enable A to perform its obligations under this Agreement in respect of that works phase = £[ ] or more;
- (d) B gives notice in writing to A within ten working days of the approval of the revised project appraisal of its failure to make budgetary provision for its investment in that works phase having regard to the revised project appraisal;

[This assumes a partnering arrangement where the Landowner is investing more than just the land.]

- (e) after the postponement of the carrying out of the Works in accordance with this clause A may prepare a further revised project appraisal and, where the reason for postponement is either the reason set out in sub-clauses (a) and (b) hereof, (b) may but not earlier than six months after the giving or receipt of the notice of postponement in accordance with this clause require A to prepare a further revised project appraisal for that Phase and the provisions of this Clause shall apply to the further revised project appraisal.'

## 8 Consultation/community involvement

Set out below is the Schedule to the JRF Agreement with York City Council as an example of the structure and modus operandi of this community-based scheme.

### ***Part 1: Membership and terms of reference of the New Osbaldwick Committee***

#### ***Membership***

- Four representatives from York City Council (YCC).
- Four representatives from JRHT.
- Four representatives from the Community Consultative Panel.
- Plus representatives from each phase of the development as it is completed and the houses are occupied – the matters relating to their appointment being for the decision of the New Osbaldwick Committee.

The meeting shall be chaired by an independent third party agreed by YCC and JRHT and the Community Consultative Panel; the first Chair shall be [ ]. The Chair shall not have a vote.

The New Osbaldwick Committee shall determine such other persons as observers.

A representative of the Housing Corporation shall be entitled to attend meetings of the New Osbaldwick Committee as an observer.

***Terms of reference***

To act as a forum for the parties to consider and consult over all aspects of the development of the Site, and in particular:

- the Master Plan
- submission of planning application
- consideration of long-term management structure
- development timetable
- special needs scheme
- appointment of sub-groups
- number and type of affordable homes
- tender documentation
- shortlisting and selection of house builders
- involvement of residents in governance structures of New Osbaldwick
- identification of community facilities
- lettings and sale plans
- to receive reports from the Technical Land Sale Group as defined in the Land Sale Agreement.

And to ensure that as far as possible issues are fully canvassed and adequately researched with a view to trying to ascertain that as far as possible an agreed view or consensus emerges on such issues before being referred to JRHT for decision. The New Osbaldwick Committee shall not itself be a decision-making or executive body. For the avoidance of doubt the decisions on these matters will be taken by JRHT.

The New Osbaldwick Committee shall be at liberty to consult interested parties and to constitute various sub-committees and working parties to expedite and facilitate the day-to-day progress of New Osbaldwick. In particular it is envisaged that there will be one or more Community Planning days to enable the local community to comment on the Master Plan.

### ***Part 2: Membership and terms of reference of the Community Consultative Panel***

#### ***Membership***

Representatives of a cross-section of the wider communities who can cover a wide range of social, community and economic issues, e.g. members of residents' associations, community associations, community groups and voluntary organisations; staff and governors of local schools; ministers and clergy at local churches; doctors and healthcare staff at local surgeries and clinics; young people involved in youth groups; police and related personnel from local stations; and representatives of local businesses. Members will be required to have regular contact with their communities and, in particular, the relevant constituencies that they represent.

Four local councillors, being one from each Parish Council (Osbaldwick and Heworth Without) and one from each of the Neighbourhood Forums (Walmgate and Heworth).

Members of the Panel may elect a Chair, a Vice-Chair and any other official posts felt necessary.

Observers: these will include JRHT and YCC officers (two of each) who will attend the Panel meetings on a regular basis to support, advise and undertake work on behalf of the Panel in between meetings.

Advisers: these will be specialists invited to particular meetings by the Panel to advise on certain areas of consideration.

***Terms of reference***

The purpose of the Consultation Panel is to represent the local communities (of Osbaldwick, Tang Hall, Meadlands and surrounding areas) and, by doing so, to ensure that the proposals reflect the concerns, views and needs of these local communities.

- Ensuring that the view, opinions and concerns of local communities about the potential development are fed into the Master Planning process as it proceeds.
- Ensuring that the work of the Panel and progress on the Master Planning process is fed back to local communities – through meetings, newsletters, notice boards, leaflets, etc.
- Taking into account the view of local people as expressed in the consultation process to date.
- Advising the Master Planning team, both directly and through the Community Adviser, on how best to identify and pursue issues with local communities.
- Requesting and taking into account advice and views from observers on the Panel, and, when necessary and appropriate, inviting advisers to Panel meetings.

