

**Case Officer:** Caroline Ford

**Applicant:** Bicester Gateway Ltd

**Proposal:** Outline application (Phase 1B) including access (all other matters reserved) for up to 4,413 sqm B1 office space (47,502 sqft) GIA, up to 273 residential units (Use Class C3) including ancillary gym, approximately 177 sqm GIA of café space (Use Class A3), with an ancillary, mixed use co-working hub (794 sqm/ 8,550 sqft GIA), multi-storey car park, multi-use games area (MUGA), amenity space, associated infrastructure, parking and marketing boards

**Ward:** Fringford and Heyfords

**Councillors:** Councillor Corkin, Councillor Macnamara and Councillor Wood

**Reason for Referral:** Major development where there are two S106 matters that are in disagreement and a Committee decision is required because of the significance of those issues

**Expiry Date:** 31 March 2021

**Committee Date:** 11 March 2021

---

## **1. REASON FOR REVERSION TO PLANNING COMMITTEE**

- 1.1. This application has been reported to Planning Committee on two previous occasions. Firstly, on the 16 July 2020, Members resolved unanimously to approve the application subject to conditions and the completion of a S106 agreement. The precise form and wording of the conditions and Heads of Terms of the Legal Agreement were not agreed at that point and so the resolution of the July 2020 Committee was to return the application to Committee by the end of October 2020 for those matters to be considered. The application was returned to Committee on the 8 October 2020 where a set of S106 Heads of Terms were presented as well as a list of conditions. Members resolved unanimously to approve the S106 Heads of Terms and the proposed planning conditions and since then discussions have been ongoing in relation to both matters to enable the grant of planning permission.
- 1.2. Unfortunately, negotiations have stalled and there are two main issues where agreement cannot be reached. Consideration of these matters by the Planning Committee is therefore required and this report will set out the advice of Officers and the applicant's position on these matters (included verbatim at Appendix 1 to this report). There are also a number of other points where Officers have agreed changes to the Committee resolution of the 8 October 2020 under normal delegated powers and to the Council's standard position for S106s and conditions have been reviewed since then. This report therefore seeks a Member position on these matters to enable the application to be brought to a swift conclusion.
- 1.3. The 'Council's standard position for S106s' as referred to above, relates to standard drafting which forms the starting point for negotiation relating to all S106s the

Council intends to enter into. The drafting is produced by the Council's Legal team and takes into account the views of Officers and Consultees on specific topic areas and covers the points required to produce a legally sound agreement that appropriately secures the content of the agreement and which is enforceable. Delegation is provided through the Scheme of Delegation for S106 agreements to be completed where required to support a planning application, or by way of a resolution made by the Planning Committee. The drafting is a starting point and it is normal for negotiation to occur on the terms of an agreement, but there are also some matters that represent important points of principle. In this case, there are two particular points which raise issues of significance which Officers consider should be referred to Members in the wider public interest.

- 1.4. The Planning Committee report presented on the 16 July 2020 sets out the site description, proposed development, consultation responses and it contains the full assessment of the proposal against the relevant Development Plan policies. The 8 October 2020 Committee report updated the Policy position with reference to the adoption of the partial review Plan. There have been no other relevant Policy changes since the 8 October 2020.
- 1.5. The Council published its December 2020 Annual Monitoring Report following its consideration by the Executive in January 2021, which has confirmed that the District currently has a 4.8 year Housing Land Supply (2020-2021), which will change to a 4.7 year Housing Land Supply from the 1 April 2021 (2021-2026). At the time of writing this report, this Housing Land Supply is against a temporary 3-year requirement as confirmed by the Written Ministerial Statement for Oxfordshire dated 12 September 2018. No fixed date has been published for the expiry of this temporary requirement, although it is understood that the Oxfordshire Growth Board have written to the Government to clarify when this change might occur.
- 1.6. There have been no further Consultation responses received other than in respect of S106 negotiations, the responses for which will be referred to within the appraisal below.

## **2. APPRAISAL**

2.1 The key issues for consideration in this case are:

- Matters of disagreement arising through the S106
- Other matters that have been changed since the previous consideration of the application by the Planning Committee

### Background

- 2.2 As referred to above, there are two main issues that are currently in disagreement between Officers and the applicant relating to the content of the S106 agreement. Those matters relate to standard provisions required to be included within all S106 agreements (and in respect of one of the points, a matter that Oxfordshire County Council require in all S106 agreements across Oxfordshire). The Officer advice as will be explained below is to continue to secure that standard drafting as it is required to make the development acceptable. It is also likely that a precedent could also be set for other proposals.
- 2.3 The applicant seeks some flexibility in order to meet the specific circumstances of the Bicester Gateway Innovation Community, notably with regard to delivery and they seek to rely on the Committee report from 8 October 2020, which, they argue confirmed that there would be no social rent and that affordable rent would be sought without mention of this being capped to LHA rates.

- 2.4 These matters are therefore brought before Members to seek a final resolution as to whether Members wish to divert from Officer advice in this case taking into account the applicant's position.
- 2.5 As an overarching point, the applicant has highlighted that the lack of agreement and therefore progress to agree the S106 to enable planning permission to be granted is stalling development from starting and hindering delivery on site.
- 2.6 Officers accept that delivery of development is a high priority for the Council as is maintaining a Housing Land Supply. However, development must be acceptable in planning terms and not result in unacceptable risk for the Council. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that any application for planning permission must be determined in accordance with the Development Plan unless material considerations indicate otherwise. It is how much weight should be given to these material considerations, balanced against adopted development plans policies which lies at the heart of the current negotiations.

### Affordable Housing

- 2.7 The applicant has agreed to the provision of affordable housing to meet the Policy BSC3 requirement for 30% affordable housing provision with this split between 70% rental and 30% intermediate tenures. The previous committee reports assessed the provision of affordable housing and advised Members that in this case, it was recommended that the rental tenure be at affordable rent levels and not social rent. This is to ensure the affordability of the units for the occupiers, taking into account that there could be significant service charges on this scheme which would be included within affordable rents but which would be an additional cost to tenants if social rent was charged. Social rent plus high service charges may not be as affordable as Affordable Rent (which includes service charges). The Council's Housing Officer advises that Affordable Rents would usually be capped at LHA levels in line with the Tenancy Strategy in the S106. In this case, the Affordable Rent tenure was agreed as a suitable and affordable solution on this basis recognising the core aspiration that the rents charged to future residents would be affordable to them. The applicant advises that the October 2020 Committee report did not mention capping of rent levels and that this was not agreed.
- 2.8 The Council's requirements relating to affordable rented housing has been disputed by the applicant who will not agree to it. The drafting states as follows (with the wording the applicant considers to be unacceptable in bold):

Affordable Rented Housing      rented housing provided by the Registered Provider to households who are eligible to rent and occupy such housing and which is not subject to the national rent regime but in line with the District Council's tenancy strategy, the rents shall be no more than 80% of the local market rent (including service charge) or the relevant Local Housing Allowance rate in force at the time the property is advertised for letting **whichever is the lower**.

- 2.9 The applicant has provided a paper which is replicated at Appendix 1 of this report to explain why they consider that capping rent levels for the affordable rented

housing to be unacceptable and not beneficial in terms of increasing the supply of affordable housing.

2.10 The Council's drafting takes into account advice from the Strategic Housing Team which draws on the Tenancy Strategy and is specific to the Cherwell District taking into account local affordability levels.

2.11 The NPPF definition of Affordable housing for rent is as follows (it does not refer to Local Housing Allowance levels):

*Affordable housing for rent: meets all of the following conditions: (a) the rent is set in accordance with the Government's rent policy for Social Rent or Affordable Rent, or is **at least** 20% below local market rents (including service charges where applicable); (b) the landlord is a registered provider, except where it is included as part of a Build to Rent scheme (in which case the landlord need not be a registered provider); and (c) it includes provisions to remain at an affordable price for future eligible households, or for the subsidy to be recycled for alternative affordable housing provision. For Build to Rent schemes affordable housing for rent is expected to be the normal form of affordable housing provision (and, in this context, is known as Affordable Private Rent).* [wording highlighted in bold by Officers].

2.12 For Cherwell, Policy BSC3 of the Cherwell Local Plan Part 1 2011-2031 relates to the requirement to provide affordable housing. In the Policy wording, there is no reference to rent levels but, the preceding paragraphs to the Policy refers to the Council's Housing Strategy which recognises the need for affordable homes. The delivery of affordable housing on development sites is directly related to ensuring the supply of affordable housing is available to deliver the Council's Statutory Housing responsibilities.

2.13 Planning Policy is not prescriptive about rent levels for affordable housing, other than the reference within the NPPF to the need for rents to be set in accordance with the Government's rent policy..., or is **at least** 20% below local market rents (with the wording 'at least' not ruling out a lower rental level).

2.14 The applicant's key point is that the NPPF does not include the words 'whichever is the lower'. Their view is that if it did, it would have the effect of altering the definition of Affordable Rent, in their view contrary to Government Policy, and that national policy offers flexibility to fund increases in the overall supply of affordable housing to meet wider affordable needs, to aid delivery and assist viability. Their view is that standard drafting seeking to cap the rental levels is inconsistent with Planning Policy.

2.15 The Council, in its Statutory Housing function is required to produce documents relating to that function by the Localism Act 2011, the Homelessness Reduction Act 2017 and the Housing and Homelessness Acts. One of those documents is a Tenancy Strategy. This document is adopted by the Council and, whilst not a planning policy, is a corporate document and therefore a matter that Members have considered, approved and would have every expectation that those principles would be delivered. As Registered Providers are key partners in assisting the Council to meet its statutory housing functions, the Tenancy Strategy sets out the Council's requirements of Registered Providers who own, let and manage affordable housing stock in Cherwell District, including how the affordable housing should be suitable and affordable to meet the local housing need. Section 8 of the Tenancy Strategy sets out the Council's expectation that Affordable Rent should be capped at Local Housing Allowance levels to ensure that the housing provided still meets a local need and rents are not a disincentive for people to take up employment or make

tenancies unsustainable. Given that new affordable rent properties, once completed by the developer, will be transferred to a Registered Provider and let by them in accordance with the Council's Allocations Scheme and Tenancy Strategy, the principles set out in the Tenancy Strategy are relevant and therefore the document is a material consideration (but not a formally adopted planning policy that sits within the Development Plan) for planning purposes in this context.

- 2.16 The previous committee reports were not specific around the definition of affordable rented housing in terms of its reference to Local Housing Allowance (which is usual for all applications of a similar nature). On the basis that the Council has standard drafting which refers to the Tenancy Strategy and LHA levels, which has been applied many times before, Officers have taken the Member resolution to be in line with normal practice and to follow that standard position (i.e. to ensure that rental levels are at 80% market rent or Local Housing Allowance level whichever is the lower). Officers do not dispute that Members were asked to endorse the position that affordable rent should be supported and social rent not pursued, but this was not asking Members to move away from the standard position around rents as is in the normal drafting. The applicant's view is that Members have endorsed a position that the rental units will be affordable rented units that are not capped at LHA level because there is no planning policy reason for LHA levels to be prescribed at the S106 stage.
- 2.17 The applicant will not agree to the wording 'whichever is the lower'. This means that in contractual discussions between the developer and RPs over the delivery and transfer of affordable housing once the units are completed, the RPs may assume that without a specified cap on rent levels, the Council is happy for 80% of market rents to be charged. In turn, this expected level of rental income may influence the purchase price for the rented units. Such financial expectations would make it difficult for the Council's Strategic Housing Team to negotiate a more affordable rent level at a later date i.e. when the affordable housing scheme is to be agreed as part of a Reserved Matters planning application. The Council's Strategic Housing Team have advised that without the wording 'whichever is the lower' in the planning agreement, this would create a significant risk that the units might not be affordable in future to meet the needs of applicants on the Council's housing register. Affordable Rent capped at Local Housing Allowance levels would be affordable for more housing applicants, not just those households receiving a higher level of income. On this basis, and if other applicants also sought this flexibility, there could be significant wider implications around the delivery of affordable housing that meets needs in this District which is a matter of broader public interest.
- 2.18 In response to the applicant's paper at Appendix 1, Officers would comment as follows:
- The applicant raises concerns regarding the Tenancy Strategy and makes reference to the March 2017 Executive report that was presented with the Tenancy Strategy. Their view is that there were only two RPs who responded to consultation on the Tenancy Strategy (a very low response rate and therefore it was not representative) and those two RPs raised concerns with it, particularly in relation to the LHA section being too prescriptive about the level of rent setting in Cherwell and the limited options for people under 35. Housing Officers advised at the time that the monitoring of RP rents had shown that a prescriptive approach is 'sometimes' needed. In response to the applicant's points, Strategic Housing Officers have advised that whilst there were just two responses received from RPs to the consultation, the two individual comments were not afforded significant weight given that they do not represent the views of the majority of RPs who develop and deliver affordable housing in the district and who did not

formally respond to the consultation. Clearly there was evidence gathered in 2017 to justify a prescriptive approach in the Tenancy Strategy to rent setting. The 'sometimes needed' comment relates to the fact that in the past some RPs rents set at 80% of market rents soon became unaffordable as annual rent increases were applied, and Welfare Reform changes were introduced to limit the housing benefit that could be paid, making the higher rents less affordable for people. Since 2017, we have seen an increase in the number and range of Registered Providers who own and manage stock across the district. Annual performance monitoring meetings are held with RPs and this facilitates an opportunity to identify any operational issues with rent setting, allocations and housing management.

- It is also relevant to add that since the Tenancy Strategy was adopted, Members have acknowledged the challenges around affordability and have sought to prioritise social rented units from new development. This is reflected in the Action Plan in the Council's adopted Housing Strategy 2019-2024, and the views expressed by Members of the Overview and Scrutiny Committee in consultation on the Homelessness and Rough Sleeping Strategy 2021-2026 that there should be more social housing not just affordable housing. This indicates that Members are concerned about affordability and it is expected that the next iteration of the Tenancy Strategy, due to be reviewed from March 2021 (with adoption planned Summer 2021) will specifically include a focus on local affordability and the types of tenure that will provide sustainable housing solutions, including more social rent tenure.
- Whilst the applicant is correct that referring to 'up to 80% market rent' does not rule out LHA level, it is considered that this not being referred to as a cap could result in a baseline expectation that 80% market rents will be what is achieved (and no less).
- The applicant refers to their desire for flexibility to deliver affordable housing in the way that they wish to, in accordance with the knowledge economy themes of the innovation community, including whether they decide to (or can afford to) provide affordable housing at LHA rates at the delivery stage. Affordable housing is sought to meet a policy requirement (BSC3), which does not explicitly prescribe LHA rates. If the applicant's level of flexibility were granted, which they consider to be as allowed for by the NPPF, then there is no certainty as to whether affordable housing to meet local need will be provided. If affordable rented housing is being provided, then it should be provided at a rental level that is affordable for those who would be eligible for the units (hence the reference to LHA levels in the Tenancy Strategy).
- The applicant believes that their scheme should be treated as innovative, due to its objective to serve the knowledge economy, and therefore that this should provide justification for moving away from standard requirements. Officers have always accepted that the applicant's ambitions for the site are supported and it is hoped that the innovation community is successful. But, on the basis that there will be no planning control over the achievement of this scheme, the development must be treated as any other residential development would be as it will consist of market and affordable units. The applicant has mis-represented the comments of the housing team in the paper provided as Appendix 1 to this report. The Officer comments were observations made in concern to the application and to seek additional information, not as points in support of it (as was reported in the July papers). The applicant suggests these points are the reason why the requirement for social rent was not pursued which is not the case. The

Officers reports (July and October) are clear that the acceptance of affordable rent was based on affordability for the occupants (as explained earlier in para 2.7) only and not due to the fact that 'qualifying affordable housing tenants would be unlikely to fit the profile' of younger entrepreneurs and knowledge economy workers as the applicant suggests.

- 2.19 Officers do not disagree with the applicant that Planning Policy does not require reference to LHA levels in securing affordable housing. However, Officers consider that the Council's Housing Strategy, including the Tenancy Strategy are a material consideration in the delivery of affordable housing that meets local need. The Tenancy Strategy is an adopted Strategy. The report Housing Officers reported at the time is not albeit the applicant seeks to rely on it and the reference to LHA levels only needing be prescribed 'sometimes'. The advice of the Strategic Housing Team follows this approach. The NPPF does not rule out rental levels below 80% of local market rent in its definition of affordable housing for rent.
- 2.20 It is also relevant to note that the applicant's vision for the site as an innovation community and providing employment opportunities could assist with providing employment opportunities for those in need. It is important that rent levels are not set at a level that could deter affordable housing tenants from entering employment.
- 2.21 Officers therefore strongly advise that the definition of affordable rented housing remains as it is drafted to refer to rental levels as no more than 80% of the local market rent (including service charge) or the relevant Local Housing Allowance rate in force at the time the property is advertised for letting whichever is the lower. This advice is based on the view that the Council's Housing and Tenancy Strategies are a material consideration which should be given significant weight in order to ensure the affordable housing being secured through the planning system meets local needs. This report seeks committee endorsement for these non-development plan policies being given this significant weight.

#### Liabilities

- 2.22 A S106 agreement is binding on the land and therefore compliance with its terms run with those who have or acquire an interest in the land. This is important to ensure that the Local Planning Authority can enforce the terms of the agreement to ensure it is complied with should there be a breach. In some cases it may be reasonable to exclude liability for those who might acquire a future interest in the site, for example statutory undertakers where their interest would not be of a type where it would be reasonable to enforce the terms of the agreement against them. The Council has standard drafting to deal with situations of this type.
- 2.23 The Council otherwise requires that all others who acquire an interest in the land are liable for compliance with the terms of the agreement. This is to ensure that the requirements that make the proposal acceptable in planning terms always remain enforceable in practice. The applicant has raised two main points of disagreement. One has been resolved by Officers (relating to the liability for future owner/occupiers or tenants of any dwellings), the other, relating to the liability for Registered Providers, remains in dispute.
- 2.24 The applicant has made the case that Registered Providers (RP), who will own and operate the affordable housing, should be excluded from liability in respect of the S106 when they act as RPs. This would mean that the Council could not enforce the terms of the S106 against an RP should there be a breach. The practical effect of this is that a situation could be engineered that obligations to (for instance) provide and maintain open space, payments for essential off-site infrastructure and even necessary highway improvements may be difficult if not impossible to secure. The

applicant believes that legal drafting can address the risks identified by Officers but the legal advice received by Officers from the Council's Legal team does not accept this.

- 2.25 Legal advice has confirmed that there is nothing in the nature of an RP that means that their development should not mitigate their impact. RPs acquire an interest in a site by virtue of affordable housing, but it is not unusual for an RP to acquire a larger interest in the land (including common areas) or to develop market housing. In your Officers' view the nature of this development makes this a real prospect, not just a legal possibility. A blanket exclusion of liability for an RP could therefore enable all liability for a S106 to be entirely avoided which would mean no mitigation for the development would be secured, there would be no ability to enforce the terms of the agreement and therefore the mitigation would need to be covered by the tax payer in the event that the Developer (RP) defaults. This means that the risk sits with both the District and County Councils and the development could continue, unhindered.
- 2.26 It must be emphasised that virtually every major development proposal involving over ten residential units requires affordable housing to be provided (See policy BSC3) and therefore for an RP to acquire at least part of the development so that it can provide that Affordable Housing. Officers do accept that an RP could be reluctant to acquire an interest in a site where they could become liable for significant costs. The applicant has provided some email correspondence from RPs which support this view. However, the expectation would be that the Developer would indemnify the RP directly to protect them from this risk and the RP correspondence seen does not seem to exclude this as an option to satisfy their concerns. The applicant has advised that this indemnity would add a considerable cost to the development of Bicester Gateway. Whilst there have been rare instances of developers requesting that RPs be excluded from all liability (except that relating to Affordable Housing itself) this has been universally resisted, as far as Officers can tell, throughout Oxfordshire. The applicant is of the view that this is not the case elsewhere.
- 2.27 The applicant has suggested wording that would exclude an RP from liability unless they acquire an interest in the whole site (so in the event that they acquire the whole site, they would be liable). This is problematic because arguably acquiring an interest in a significant proportion of the site (99%) would still mean that the RP would not be liable. The concerns Officers have are therefore still valid for the same reasons as above. Negotiating a position around the level of interest an RP might have in a site would not be a workable solution.
- 2.28 The applicant has since suggested three further alternatives which are included at the end of the note dated 22 February 2021 (Appendix 1). In response Officers, would comment:
- The Council cannot be expected to waive necessary mitigation arising from a large residential development solely because of the nature of the Developer. Affordable Housing is expected to mitigate its impacts and there is no policy justification for doing otherwise.
  - The cost of a Bond depends on the risk associated with it. It is for the applicant to resolve how they deal with this risk (and the added costs) but it should not be that the Local Authorities are expected to deal with this risk.
  - The offer to make financial contributions payable in full before occupation does not fully resolve the position as it still leaves those obligations securing on site mitigation and the delivery of any off-site works, such as highway works, at risk. Further, it is clear that the alternative drafting proposed leaves



the developer with the option of not making the payments up front, and bringing the RP liability back in, which is no different to the present drafting. The applicant argues that this would give them the opportunity to explore the costs of the bonds that would need to underpin the indemnity required by the RP, however Officers consider that this risk is too great. Officers would also note that so far as financial obligations are concerned, the developer does have the option of paying early, should they so wish, which would have the same effect as releasing the RP from those obligations, but without the Councils taking the risk of non-compliance. It should also be noted that it is not the case that highway obligations will be protected by a bond under the s106, as no bond is required for highway works under the s106 agreement. Further, officers would need to reconsider any provisions regarding occupation in the event of breach presently agreed should this approach be considered further.

- 2.29 The applicant requests a nuanced approach in the drafting to save costs and to address the risks of concern to Officers because they consider the risk applies only where the developer defaults or in the event that the RP acts as the developer of the whole site. However, Officers strongly advise Members that RPs should not be excluded from liability from this or any other S106 agreement. As Officers have advised, should a situation occur where an RP takes control of a large proportion of a site, a situation could occur where the Council could not enforce the terms of the agreement. This would introduce significant risk to both the District and County Authorities, and in the absence of the ability to enforce the terms of the agreement, the development would be unacceptable in planning terms.

#### Education

- 2.30 Members will be aware that the applicant continued to challenge the requested education contributions up to the 8 October 2020 Planning Committee (with a long-written update provided on this matter). Following the meeting, the applicant continued to challenge the requested contribution and negotiations continued. In November 2020 and whilst reviewing the position on education contributions again, OCC Officers advised that they had noted that the site actually sat within Chesterton Parish. On the basis that there is a current project to expand Chesterton CE Primary School, it would be legitimate to seek a contribution towards that project at expansion costs rather than the new build rate previously sought. If children attend this school, then they would be likely to attend early education in the village and as there is a pre-school accommodated in the Village Hall for which there is no plan to expand it, no early education contribution would be required.
- 2.31 On this basis, OCC sought a primary education contribution of **£308,592** (index linked) based upon 16 pupils the site would generate. No change is made to the requested secondary contribution as set out in the October 2020 Committee report.
- 2.32 Whilst Officers consider that residents of the site are more likely to be reliant upon Bicester for every day services to meet their needs rather than Chesterton, it is entirely possible that children from the site would be allocated a place at Chesterton Primary School if it is in the catchment. On this basis, the revised request is reasonable and the applicant has accepted the revised contributions requested and the S106 drafting refers to this. Members are asked to endorse this position.

## Landscape

2.33 The October 2020 Committee report required the provision of

*Commuted sums for the management and maintenance of open spaces, mature trees/ hedgerows, SUDs features with open space, play facilities and the MUGA if these areas were to be transferred to the District Council or secure arrangements for a Management Company to carry out the long term management and maintenance in the event a transfer to the District Council does not take place with secure arrangements for the financing of the management and maintenance including monitoring by CDC.*

2.34 This wording aimed to cover the requirements as set out by Appendix 8 of the Council's Developer Contributions SPD and the Council has standard drafting to secure this.

2.35 The applicant objected to the Council's requirements and in particular the step in rights (in terms of land transfer to the District Council in the event of default by a Management Company) because they consider their site should be treated in the same way that a commercial site is treated where there are limited controls, despite their proposal to include residential development on the site. Through negotiation, it has been agreed that the main residential part of the site will be subject to the Management Company provisions only and, whilst in a slightly different form to normal, there will be secure arrangements to ensure that if a Management Company defaults in terms of their maintenance responsibilities, there would be the ability for CDC to step in. Officers are content with the negotiated position.

## Other matters

2.36 Planning Conditions have evolved since planning committee in October 2020. Most of these have evolved to clarify the conditions and have taken into account comments from the applicant and consultees. There are a couple of conditions to highlight at this stage:

- The originally recommended condition to control the use of the development has been amended to three separate conditions which enables reference to be made to the amendments made to the Use Class Order in September 2020. The applicant has raised concerns with the approach suggested in a couple of ways:
  - Firstly, the applicant wishes for wording to refer to ancillary Class B1c uses be included as a marketing tool for the site. Officers consider this to be unnecessary because ancillary uses do not need planning permission and so do not need to be specified. In the same way that B1c uses would be ancillary so to would other uses. The applicant is content with this clarification.
  - Secondly, the applicant has concerns over how Officers had drafted a use condition relating to the mixed-use Hub. In recognition of this concern, Officers consider that a condition to require a scheme for the Hub be submitted for approval and for the use of the Hub to then be accordance with that scheme only.
- The July 2020 Officer report referred to the need for the commercial development to be delivered in a timely fashion alongside the residential development and that the residential use should be restricted until development of the commercial floorspace has commenced. This was

clarified in the October 2020 report whereby it was confirmed that on the basis that the intention is that the development would create demand for the office space (by bringing those likely to work in the knowledge economy to the town) that it was not feasible for this restriction to be in place but that the Hub would be constructed alongside the residential development. The condition previously therefore required the mixed-use hub to be delivered prior to the first occupation of any residential development. The applicant continued to raise concerns with this and Officers have agreed to re-word the condition to ensure the mixed-use hub is delivered as part of the first residential phase.

### **3. PLANNING BALANCE AND CONCLUSION**

- 3.1 Officers do not wish to change the recommendation for this proposed development based upon the reasons as set out in the July and October 2020 Committee reports. However, Officers consider that it is necessary for there to be a completed S106 that adequately secures mitigation required to make the development acceptable in planning terms. The Officer position as reported is recommended to be the position Members support to ensure this is the case. If Members do support this position but the applicant continues to resist this, Officers consider that the application should be refused in the absence of the completion of a S106 to secure the required mitigation, in which case the applicant has confirmed that the matter will first go to viability testing and then, if necessary, proceed to appeal.

### **4. RECOMMENDATION**

**RECOMMENDATION – DELEGATE TO THE ASSISTANT DIRECTOR FOR PLANNING AND DEVELOPMENT TO GRANT PERMISSION, SUBJECT TO THE CONDITIONS SET OUT BELOW (AND ANY AMENDMENTS TO THOSE CONDITIONS AS DEEMED NECESSARY) AND THE COMPLETION OF A PLANNING OBLIGATION UNDER SECTION 106 OF THE TOWN AND COUNTRY PLANNING ACT 1990, AS SUBSTITUTED BY THE PLANNING AND COMPENSATION ACT 1991, TO SECURE THE MITIGATION AS SET OUT IN PARAGRAPH 2.45 OF THE 8 OCTOBER 2020 PLANNING COMMITTEE REPORT AND AS AMENDED BY THIS REPORT INCLUDING SUPPORTING THE OFFICER POSITION ON THE MATTERS CURRENTLY IN DISPUTE (RP LIABILITY AND AFFORDABLE HOUSING).**

**FURTHER RECOMMENDATION – IF THE APPLICANT CONTINUES TO REFUSE TO AGREE TO SIGN A S106 FOLLOWING OFFICER ADVICE (AS ENDORSED BY MEMBERS) BY THE 31 MARCH 2021 (OR ALTERNATIVE DATE AS AGREED IN WRITING WITH THE LPA), THEN IT IS RECOMMENDED THAT THE ASSISTANT DIRECTOR FOR PLANNING AND DEVELOPMENT IS GIVEN DELEGATED AUTHORITY TO REFUSE THE APPLICATION BASED UPON THE LACK OF A COMPLETED S106 AGREEMENT REQUIRED TO SECURE THE NECESSARY INFRASTRUCTURE TO MITIGATE THE IMPACTS OF THE DEVELOPMENT (WITH REFERENCE TO POLICY THAT REQUIRES MITIGATION TO BE SECURED)**

#### CONDITIONS

##### TIME LIMITS AND GENERAL IMPLEMENTATION CONDITIONS

1. No more than 4,413sqm (GIA) of floorspace for uses falling within Class B1a and B1b of the Town and Country Planning (Use Classes) Order 1987 (or their equivalent in subsequent enactments or re-enactments), shall be constructed on the site and the floorspace shall be used for no other purposes whatsoever. For

the avoidance of doubt and with reference to the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, from the 01 September 2020, Use Classes B1a and B1b are now part of Class E, specifically Class E(g)(i) and E(g)(ii). The floorspace hereby approved, shall be used for no other uses covered by the other Categories of Class E.

Reason – In order to retain planning control over the use of the site and to ensure that the impacts of the development are no greater than those considered under this application in accordance with Policies SLE1 and Bicester 10 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

2. No more than 177sqm (GIA) of floorspace for uses falling within Class A3 of the Town and Country Planning (Use Classes) Order 1987 (or their equivalent in subsequent enactments or re-enactments) shall be constructed on the site and the floorspace shall be used for no other purposes whatsoever. For the avoidance of doubt and with reference to the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020, from the 01 September 2020, Use Class A3 is now part of Class E, specifically Class E(b). The floorspace hereby approved, shall be used for no other uses covered by the other Categories of Class E.

Reason – In order to ensure that the facility is ancillary and supports the primary use of the site for business uses and to retain planning control over the use of the site in accordance with Policies SLE4 and Bicester 10 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

3. No more than 794sqm (GIA) of floorspace shall be used as a mixed use co-working hub, a scheme for which, to include details of how the space shall be used by multiple, unconnected users in a way which is compatible and does not prejudice office type activities, shall be submitted to and approved in writing by the Local Planning Authority prior to the first use of the mixed use co-working hub. The mixed use co-working hub shall be used in accordance with the agreed scheme thereafter.

Reason: To ensure that the final use of the facility is approved and to ensure that the proposal complies with Policies SLE1, SLE4 and Bicester 10 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

4. No development shall commence on a phase identified within an approved phasing plan until full details of access (in so far as not approved by this decision), layout, scale, appearance and landscaping (hereafter referred to as reserved matters) of the development proposed to take place within that approved phase have been submitted to and approved in writing by the Local Planning Authority.

Reason: To comply with the provisions of Section 92 of the Town and Country Planning Act 1990, as amended by Section 51 of the Planning and Compulsory Purchase Act 2004, and Article 6 of the Town and Country Planning (Development Management Procedure (England)) Order 2015 (as amended).

5. Application for approval of all the reserved matters shall be made to the Local Planning Authority before the expiration of three years from the date of this permission and the development hereby permitted shall be begun either before the expiration of five years from the date of this permission or before the expiration of

two years from the date of approval of the last of the reserved matters to be approved whichever is the later.

Reason: To comply with the provisions of Section 92 of the Town and Country Planning Act 1990, as amended by Section 51 of the Planning and Compulsory Purchase Act 2004, and Article 5(1) of the Town and Country Planning (Development Management Procedure (England)) Order 2015 (as amended).

6. Except where otherwise stipulated by conditions attached to the Reserved Matters Permission(s), the development shall be carried out strictly in accordance with the following plans and documents:

PL03C – Regulating Plan

PL05 – Reserved Land

46463/5501/001 Rev C – Wendlebury Road Vehicle Access and Pedestrian Improvements

46463/5501/002 Rev A – Wendlebury Road Proposed Improvements (if required)

Reason - For the avoidance of doubt, to ensure that the development is carried out only as approved by the Local Planning Authority and to comply with Government guidance contained within the National Planning Policy Framework and Planning Practice Guidance.

7. All site clearance (including the removal of any vegetation or works to hedgerows) shall be timed so as to avoid the bird nesting season, this being during the months of March until July inclusive unless the Local Planning Authority has confirmed in writing that such works can proceed, based on submission of a survey (no more than 48hrs before works commence) undertaken by a competent ecologist to assess the nesting bird activity on site, together with details of measures to protect the nesting bird interest on the site as required.

Reason: To ensure that the development will conserve and enhance the natural environment and will not cause significant harm to any protected species or its habitat to comply with Policy ESD10 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

8. Except to allow for the creation of means of access with associated vision splays hereby approved, the existing hedgerows along the western (A41), southern and eastern (Wendlebury Road) boundaries of the site shall be retained and properly maintained from the date of this planning permission (unless otherwise approved as part of the approval of reserved matters submitted in requirement of Condition 2), and if any hedgerow plant/tree dies within five years from the completion of the development it shall be replaced and shall thereafter be properly maintained in accordance with this condition.

Reason - In the interests of the visual amenities of the area, to provide an effective screen to the proposed development and to comply with Policies ESD13 and ESD15 of the Cherwell Local Plan 2011-2031, saved Policy C28 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework.

9. All planting, seeding or turfing comprised in the approved details of landscaping shall be carried out in the first planting and seeding seasons following the occupation of the building(s) or on the completion of the development, whichever is the sooner, and shall be maintained for a period of 5 years from the completion of the development. Any trees and/or shrubs which within a period of five years

from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species, unless the Local Planning Authority gives written consent for any variation.

Reason: To ensure that the agreed landscaping scheme is maintained over a reasonable period that will permit its establishment in the interests of visual amenity and to accord with Policy ESD15 of the Cherwell Local Plan 2011 – 2031 Part 1, Saved Policy C28 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework.

10. If, during development, contamination not previously identified is found to be present at the site, no further development shall be carried out until full details of a remediation strategy detailing how the unsuspected contamination shall be dealt with has been submitted to and approved in writing by the Local Planning Authority. Thereafter the remediation strategy shall be carried out in accordance with the approved details.

Reason: To ensure that any ground and water contamination is identified and adequately addressed to ensure the safety of the development, the environment and to ensure the site is suitable for the proposed use, to comply with Saved Policy ENV12 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework.

11. All applications for approval of reserved matters relating to an approved phase shall be accompanied by details of the existing ground levels together with proposed finished floor levels of all buildings within that phase (with the level no less than 65.30m AOD as set out in the plans accompanying the LLFA Response reference number JAG//43386/Lt004). Development in that phase shall thereafter be undertaken in accordance with the ground/floor levels approved as part of the grant of reserved matters approval.

Reason - To ensure that the proposed development is in scale and harmony with its neighbours and surroundings and to comply with Policy ESD 15 of the Cherwell Local Plan 2011-2031, saved Policy C28 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework.

12. All applications for approval of reserved matters relating to an approved phase shall be accompanied by details of the proposed ecological enhancement measures to be incorporated within that phase in line with the recommendations at paragraph 18 of the Ecology Briefing Note prepared by Ecology Solutions Limited. All proposed ecological enhancement measures shall thereafter be installed in accordance with the details approved as part of the grant of reserved matters approval.

Reason: To protect habitats of importance to biodiversity conservation from any loss or damage and to enhance ecological opportunities at the site in accordance with Policy ESD10 of the Cherwell Local Plan 2011 – 2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

13. All applications for approval of reserved matters relating to an approved phase shall be accompanied by an Energy Statement based upon Revision P02 of the Energy Statement prepared by Kyoob that demonstrates which sustainable design measures, including the provision of on-site renewable energy technologies, will be incorporated into that phase. The sustainable design measures shall thereafter be fully incorporated into the development of each phase and no occupation of development within the relevant phase shall take place until the approved

sustainable design measures have been provided and, for on-site renewable energy provision, until such measures are fully installed and operational.

Reason – To ensure energy and resource efficiency practices are incorporated into the development in accordance with Policies Bicester 10, ESD3, ESD4 and ESD5 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

14. The non-residential floorspace hereby permitted shall be constructed to at least a BREEAM 'Very Good' Standard.

Reason – To ensure energy and resource efficiency practices are incorporated into the development in accordance with Policies Bicester 10, ESD3, ESD4 and ESD5 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

15. Notwithstanding any provisions contained within the Town and Country Planning (General Permitted Development) (England) Order 2015 (and any Order or Statutory Instrument amending, revoking or re-enacting that order), all water supply, foul water, energy, power (except any approved renewable energy infrastructure) and communication infrastructure to serve the development shall be provided underground and retained as such thereafter except where specifically approved otherwise as part of a grant of reserved matters approval for a phase.

Reason - In the interests of ensuring that such above ground infrastructure is not constructed in unsuitable locations on the site where it would be harmful to visual amenity and to comply with Policy ESD 15 of the Cherwell Local Plan 2011-2031, saved Policy C28 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework.

#### PRE COMMENCEMENT CONDITIONS

16. No development shall take place until a phasing plan covering the entire application site has been submitted to and approved in writing by the Local Planning Authority identifying the phases by which development will take place. The phasing plan shall demonstrate the delivery of the approximately 794sqm (GIA) mixed-use co-working hub to be delivered as part of the first residential phase. Thereafter the development shall be carried out in accordance with the approved phasing plan and applications for approval of reserved matters shall be submitted in accordance with the terms of the approved phasing plan and refer to the phase (or phases) to which they relate.

Reason: To ensure the proper phased implementation of the development and associated infrastructure in accordance with Policies ESD15, Bicester 10 and INF1 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of any development on the appropriate phase as it is fundamental to the acceptability of the scheme.

17. No development shall take place on any phase, including any works of demolition until a Construction Method Statement has been submitted to, and approved in writing by the Local Planning Authority. The statement shall be appropriately titled (site and planning permission number) and shall provide for at a minimum:

- The parking of vehicles of site operatives and visitors;
- The routeing of HGVs to and from the site;
- Loading and unloading of plant and materials;

- Storage of plant and materials used in constructing the development;
- The erection and maintenance of security hoarding including decorative displays and facilities for public viewing, where appropriate;
- Wheel washing facilities including type of operation (automated, water recycling etc) and road sweeping;
- Measures to control the emission of dust and dirt during construction;
- A scheme for recycling/ disposing of waste resulting from demolition and construction works;
- Delivery, demolition and construction working hours;
- Spoil locations
- Water management

The approved Construction Method Statement shall be adhered to throughout the construction period for the development.

Reason: To ensure the environment is protected during construction in accordance with Saved Policy ENV1 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

18. No development shall take place on any phase (including demolition, ground works, vegetation clearance) until a Construction Environmental Management Plan (CEMP: Biodiversity) has been submitted to and approved in writing by the Local Planning Authority. The CEMP: Biodiversity shall include as a minimum:
- a) Arrangements for a site walkover survey undertaken by a suitably qualified Ecologist to ensure that no protected species, which could be harmed by the development have moved onto the site since the previous surveys were carried out. If any protected species are found, details of mitigation measures to prevent their harm shall be required to be submitted;
  - b) Risk assessment of potentially damaging construction activities;
  - c) Identification of 'Biodiversity Protection Zones';
  - d) Practical measures (both physical measures and sensitive working practices) to avoid or reduce impacts during construction (may be provided as a set of method statements);
  - e) The location and timing of sensitive works to avoid harm to biodiversity features;
  - f) The times during construction when specialist ecologists need to be present on site to oversee works;
  - g) Responsible persons and lines of communication;
  - h) The role and responsibilities on site of an ecological clerk of works (ECoW) or similarly competent person;
  - i) Best practice with regard to wildlife including use of protective fences, exclusion barriers and warning signs

The approved CEMP: Biodiversity shall be adhered to and implemented throughout the construction period strictly in accordance with the approved details, unless otherwise agreed in writing by the Local Planning Authority.

Reason: To protect habitats of importance to biodiversity conservation from any loss or damage in accordance with Policy ESD10 of the Cherwell Local Plan 2011 – 2031 Part 1 and Government guidance contained within Section 15 of the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.



19. No development shall take place on any phase until an Arboricultural Method Statement for that phase, undertaken in accordance with BS:5837:2012 and all subsequent amendments and revisions to include a plan identifying which trees are to be retained and details of how they will be protected, is submitted to and approved in writing by the Local Planning Authority. Thereafter, all works on site shall be carried out in accordance with the approved AMS and any tree protection measures shall be erected before any equipment, machinery or materials are brought onto the site for the purposes of development and shall be maintained until all equipment, machinery and surplus material has been removed from the site.

Reason: To ensure the continued health of retained trees/hedges and to ensure that they are not adversely affected by the construction works, in the interests of the visual amenity of the area, to ensure the integration of the development into the existing built environment and to comply with Policy C28 of the adopted Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

20. No construction shall take place until a Training and Employment Plan for the development has been submitted to and approved in writing by the Local Planning Authority. As a minimum this Plan shall include the arrangements by which the applicant (or other specified persons) will provide construction (and related trades) apprenticeship starts during construction of the development hereby approved. Construction shall take place in accordance with the agreed Plan.

Reason: Paragraphs 80 and 81 of the National Planning Policy Framework support and encourage sustainable economic growth. Para B14 of the adopted Cherwell Local Plan 2011- 2031 recognises that it is important to ensure the population is sufficiently skilled to attract companies and investment to Cherwell and supports proposals to strengthen the skills base of the local economy. Strategic Objective 3 of the adopted Cherwell Local Plan seeks to support an increase in skills.

21. No development shall take place until a Detailed Design, Surface Water Management Strategy, Drainage Strategy (including calculations, ground levels and plans), associated management and maintenance plan of surface water drainage for the site using sustainable drainage methods and details of the phasing of its provision has been submitted to and approved in writing by the Local Planning Authority. The detailed drainage will follow the Outline Design principles set out in the following documents:

- 43386 Lt004 LLFA Response (JAG) COMPLETE

The approved Sustainable Drainage System shall be implemented in accordance with the approved Detailed Design and prior to the first occupation of the development in that phase. The Sustainable Drainage Scheme shall be managed and maintained thereafter in perpetuity in accordance with the agreed management and maintenance plan.

Reason: To ensure that the principles of sustainable drainage are incorporated into this proposal in accordance with Policy ESD8 of the Cherwell Local Plan 2011-2031 Part 1 and Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

22. No development shall take place on any phase until full details of the means of vehicular access between the land and the highway on Wendlebury Road including position, layout, and vision splays shall be submitted to and approved in writing by the Local Planning Authority. Thereafter, and prior to the first occupation of any of the development, the means of access shall be constructed and retained in accordance with the approved details.

Reason: In the interests of highway safety, to ensure a satisfactory standard of construction and layout for the development and to comply with Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

23. No development shall take place until full details of the combined footway/cycleways serving the site along the A41, Wendlebury Road, and accesses to the south onto the disused slip road including details of the pedestrian/cycle feature linking the site (over the culvert/ditch) to the A41, have been submitted to and approved in writing by the Local Planning Authority. The approved pedestrian and cycle facilities shall thereafter be provided prior to the first occupation any phase of the development.

Reason - In the interests of ensuring that suitable access is provided to the development that prioritises sustainable travel in accordance with the requirements of Policies Bicester 10 and SLE4 of the Cherwell Local Plan 2011-2031 Part 1 and to comply with Government guidance contained within the National Planning Policy Framework. This information is required prior to the commencement of the development as it is fundamental to the acceptability of the scheme.

24. No development shall take place (including any demolition) until and prior to the submission of the first reserved matters application, a professional archaeological organisation acceptable to the Local Planning Authority, has undertaken an archaeological evaluation of the site. This evaluation will need to be undertaken in accordance with a Written Scheme of Investigation, which has first been agreed with the Local Planning Authority. The Archaeological Evaluation of the site shall be submitted to and approved in writing by the Local Planning Authority. The conclusions of the Archaeological Evaluation shall be taken into account in the future layout of the application site.

Reason - To identify areas of significant archaeological interest not included in the previous evaluation to comply with Government advice in the National Planning Policy Framework (NPPF) (Section 16). This information is required prior to the commencement of the development as it is fundamental to the acceptability of the scheme.

25. No development shall take place (including any demolition) until the results of the archaeological evaluation required by condition 24 have been agreed and full details of archaeological protection measures have been approved in writing by the Local Planning Authority in a Construction Environmental Management Plan (CEMP) or equivalent document as set out in the Archaeological Mitigation Strategy (rev2 June 2020) submitted with this application.

Reason - To safeguard the physical preservation of significant archaeological deposits within the site to comply with Government advice in the National Planning Policy Framework (NPPF) (Section 16). This information is required prior to the commencement of the development as it is fundamental to the acceptability of the scheme.

26. Following the approval of the archaeological protection measures required by condition 25, and prior to any demolition on the site and the commencement of the development (other than in accordance with the archaeological protection measures required by condition 25), a second stage Written Scheme of Investigation, including a programme of methodology, site investigation and recording, shall be submitted to and agreed in writing by the Local Planning Authority.

Reason: To secure the provision of archaeological investigation and the subsequent recording of the remains, to comply with Government advice in the National Planning Policy Framework (NPPF) (Section 16). This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

27. Following the approval of the second stage Written Scheme of Investigation referred to in condition 26, and prior to the commencement of the development (other than in accordance with the Written Scheme of Investigation), the programme of archaeological mitigation shall be carried out and fully completed in accordance with the approved second stage Written Scheme of Investigation. The programme of work shall include all processing, research and analysis necessary to produce an accessible and useable archive and a full report for publication which shall be submitted to the Local Planning Authority within two years of the completion of the archaeological fieldwork.

Reason: To safeguard the identification, recording, analysis and archiving of heritage assets before they are lost and to advance understanding of the heritage assets in their wider context through publication and dissemination of the evidence in accordance with the NPPF (2019). This information is required prior to the commencement of the development as it is fundamental to the acceptability of the scheme

28. No phase of the development shall take place until a desk study and site walk over to identify all potential contaminative uses on site, and to inform the conceptual site model has been carried out by a competent person and in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and has been submitted to and approved in writing by the Local Planning Authority. No development shall take place until the Local Planning Authority has given its written approval that it is satisfied that no potential risk from contamination has been identified.

Reason: To ensure that any ground and water contamination is identified and adequately addressed to ensure the safety of the development, the environment and to ensure the site is suitable for the proposed use to comply with Saved Policy ENV12 of the Cherwell Local Plan 1996 and Government guidance contained within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

29. If a potential risk from contamination is identified as a result of the work carried out under condition 28, prior to the commencement of the development hereby permitted, a comprehensive intrusive investigation in order to characterise the type, nature and extent of contamination present, the risks to receptors and to inform the remediation strategy proposals shall be documented as a report undertaken by a competent person and in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and submitted to and approved in writing by the Local Planning Authority. No development shall take place unless the Local Planning

Authority has given its written approval that it is satisfied that the risk from contamination has been adequately characterised as required by this condition.

Reason: To ensure that any ground and water contamination is adequately addressed to ensure the safety of the development, the environment and to ensure the site is suitable for the proposed use, to comply with Saved Policy ENV12 of the Cherwell Local Plan 1996 and Government guidance within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

30. If contamination is found by undertaking the work carried out under condition 28, prior to the commencement of the development hereby permitted, a scheme of remediation and/or monitoring to ensure the site is suitable for its proposed use shall be prepared by a competent person and in accordance with DEFRA and the Environment Agency's 'Model Procedures for the Management of Land Contamination, CLR 11' and submitted to and approved in writing by the Local Planning Authority. No development shall take place until the Local Planning Authority has given its written approval of the scheme of remediation and/or monitoring required by this condition.

Reason: To ensure that any ground and water contamination is adequately addressed to ensure the safety of the development, the environment and to ensure the site is suitable for the proposed use, to comply with Saved Policy ENV12 of the Cherwell Local Plan 1996 and Government guidance within the National Planning Policy Framework. This information is required prior to commencement of the development as it is fundamental to the acceptability of the scheme.

#### CONDITIONS REQUIRING APPROVAL OR COMPLIANCE BEFORE SPECIFIC CONSTRUCTION WORKS TAKE PLACE

31. No piling shall take place until a Piling Method Statement (detailing the depth and type of piling to be undertaken and the methodology by which such piling shall be carried out, including measures to prevent and minimise the potential for damage to subsurface water infrastructure, and the programme for the works) has been submitted to and approved in writing by the Local Planning Authority (in consultation with Thames Water). Any piling must be undertaken in accordance with the terms of the approved Piling Method Statement.

Reason: In order to protect groundwater and to achieve sustainable development in accordance with Section 15 of the National Planning Policy Framework.

32. No development above slab level on any building proposed to contain residential units shall take place until a scheme for protecting the proposed dwellings from noise has been submitted to and approved in writing by the Local Planning Authority. The submitted scheme shall achieve internal levels that shall not normally exceed 30dB LAeq (8 hour) and 45dB L<sub>max</sub>F in all sleeping areas between 2300 hours and 0700 hours. An internal level of 40dB LAeq 1 hour shall be achieved in all other areas of the building. An external level of 55dB LAeq (16 hours) shall be achieved in garden areas and balconies unless a higher level has been demonstrated as being acceptable through noise modelling. Any works which form part of the scheme shall be completed in accordance with the approved details before any of the permitted dwellings to which the scheme relates are occupied.

Reason - To avoid noise giving rise to significant adverse impacts on health and quality of life and to comply with Saved Policy ENV1 of the Cherwell Local Plan 1996 and Government guidance within the National Planning Policy Framework.

## CONDITIONS REQUIRING APPROVAL OR COMPLIANCE BEFORE OCCUPATION

33. No part of the development shall be occupied until confirmation has been provided that either:
- all water network upgrades required to accommodate the additional flows to serve the development have been completed; or
  - a housing and infrastructure phasing plan has been agreed with Thames Water to allow additional properties to be occupied. Where a housing and infrastructure phasing plan is agreed no occupation shall take place other than in accordance with the agreed housing and infrastructure phasing plan.

Reason - Network reinforcement works are anticipated to be necessary to ensure that sufficient capacity is made available to accommodate additional demand anticipated from the new development. Any necessary reinforcement works will be necessary in order to avoid low / no water pressure issues. In order to comply with Policy ESD8 of the Cherwell Local Plan 2011 - 2031 Part 1 and Government guidance contained within the National Planning Policy Framework.

34. If remedial works have been identified in condition 30, the relevant part of the development shall not be occupied until the remedial works have been carried out in accordance with the scheme approved under condition 30. A verification report that demonstrates the effectiveness of the remediation carried out must be submitted to and approved in writing by the Local Planning Authority.

Reason - To ensure that any ground and water contamination is adequately addressed to ensure the safety of the development, the environment and to ensure the site is suitable for the proposed use, to comply with Saved Policy ENV12 of the Cherwell Local Plan 1996 and Government guidance within the National Planning Policy Framework.

35. Prior to the occupation of any phase of the development hereby approved, an updated Framework Travel Plan, prepared in accordance with the Department of Transport's Best Practice Guidance Note "Using the Planning Process to Secure Travel Plans" and its subsequent amendments, shall be submitted to and approved in writing by the Local Planning Authority for that phase. This Framework Travel Plan shall be based on the draft document 46463 dated January 2020. The travel plan for each phase shall be implemented in accordance with the details approved.

Reason - In the interests of sustainability and to ensure a satisfactory form of development, in accordance with Government guidance contained within the National Planning Policy Framework.

36. Prior to first occupation of the development hereby approved, a Landscape and Ecology Management Plan (LEMP) shall be submitted to and approved in writing by the Local Planning Authority. Thereafter, the LEMP shall be carried out in accordance with the approved details.

Reason: To protect habitats of importance to biodiversity conservation from any loss or damage in accordance with Policy ESD10 of the Cherwell Local Plan 2011 – 2031 Part 1 and Government guidance contained within Section 15 of the National Planning Policy Framework.

37. The development hereby permitted shall not be occupied until it has been provided with a system of electrical vehicle charging to serve the development. In addition, ducting should be in place to allow for the easy expansion of the EV charging system as demand increases towards the planned phase out of ICE vehicles (ideally ducting should be provided to every parking space to future proof the development).

Reason: To comply with policies SLE 4, ESD 1, ESD 3 and ESD 5 of the adopted Cherwell Local Plan 2011-2031 Part 1 and to maximise opportunities for sustainable transport modes in accordance with Government guidance within the National Planning Policy Framework.

38. Prior to the first occupation of any development within a phase, a car park management plan relating to that phase shall be submitted to and approved in writing by the Local Planning Authority. The car park management plan shall include measures to ensure that the car parking areas within the phase are made available solely for use in connection with the use of the development hereby approved and for no other purpose whatsoever. Thereafter, the entirety of the development on Phase 1B shall operate in accordance with the approved car park management plan.

Reason - To ensure that car travel is not unduly encouraged as a means of accessing surrounding development and to comply with Policy SLE4 of the Cherwell Local Plan 2011-2031 Part 1 as well as Government guidance contained in the National Planning Policy Framework.

39. Details of external lighting including the design, position, orientation and any screening of the lighting shall be submitted to and approved in writing by the Local Planning Authority prior to commencement of those works. The lighting shall be installed prior to the first occupation of the development and operated in accordance with the approved details at all times thereafter.

Reason: In order to safeguard the visual amenities of the area and to achieve a suitable lighting scheme which would minimise the impact to ecology and biodiversity in accordance with Policy ESD10 and ESD15 of the Cherwell Local Plan 2011 – 2031 Part 1, Saved Policy C28 of the Cherwell Local Plan 1996 and Government advice in The National Planning Policy Framework.

40. No development shall be occupied until a scheme for the commissioning and provision of public art to be accommodated within the site has been submitted to and approved in writing by the Local Planning Authority. The approved scheme shall thereafter be implemented in accordance with the approved details prior to the occupation of any B1a floorspace or 150 residential units whichever is sooner.

Reason - To create an attractive and distinctive development in accordance with Policy ESD15 of the Cherwell Local Plan 2011 – 2031 Part 1, Policy C28 of the adopted Cherwell Local Plan and Government guidance within the National Planning Policy Framework.

41. The dwelling(s) hereby approved shall not be occupied until bins for the purposes of refuse, food waste, recycling and green waste have been provided for use by each of the approved dwellings, in accordance with the Council's current bin specifications and requirements.

Reason - To provide appropriate and essential infrastructure for domestic waste management in accordance with the provisions of Policy INF1 of the Cherwell Local Plan 2011 - 2031.

42. The development shall be constructed so as to meet as a minimum the higher Building Regulation standard for water consumption limited to 110 litres per person per day.

Reason: The site is located in an area of water stress and therefore reaching a higher level of water efficiency is required to comply with Policy ESD3 of the Cherwell Local Plan 2011-2031.

### Planning Notes

1. With respect to condition 21, the applicant is advised that the following information is required to be included:
  - Final points of discharge and rate to be clearly noted on drawing.
  - A compliance report to demonstrate how the scheme complies with the “Local Standards and Guidance for Surface Water Drainage on Major Development in Oxfordshire”
  - Detailed design drainage layout drawings of the SuDS proposals including cross section details.
  - Detailed design clearly demonstrating how exceedance events will be managed.
  - Pre and Post development surface water flow paths to be identified on the plan.
  - Details of how water quality will be maintained during construction.
  - Infiltration test results to BRE365 to be submitted.
  - Evidence of groundwater depth test results to be submitted.
  - Groundwater level monitoring to be undertaken for the duration of one year from completion of construction.
  - Evidence that WFD requirements have been addressed to improve water quality.
  - Discharge rates
  - Discharge volumes
  - Sizing of features - attenuation volume
  - Detailed drainage layout with pipe numbers
  - SUDS (list the suds features mentioned within the FRA and associated Drainage Strategy documentation to ensure they are carried forward into the detailed drainage strategy)
  - Network drainage calculations
  - Phasing
2. The applicant is advised that in accordance with Section 21 of the Flood and Water Management Act 2010 and prior to the occupation of the development, a record of the approved SUDs details should be deposited in the Lead Local Flood Authority Asset Register. The details should include as built plans in both .pdf and .shp file format, photographs to document each key stage of the drainage system when installed on site and photographs to document the completed installation of the drainage structures on site.
3. With respect to Public Rights of Way it is the responsibility of the developer to ensure that the application takes account of the legally recorded route and width of any public rights of way as recorded in the definitive map and statement. This may differ from the line walked on the ground. The Definitive Map and Statement is available online at [www.oxfordshire.gov.uk/definitivemap](http://www.oxfordshire.gov.uk/definitivemap)

4. No materials, plant, temporary structures or excavations of any kind should be deposited / undertaken on or adjacent to the Public Right of Way that obstructs the public right of way whilst development takes place.
5. The development should be designed and implemented to fit in with the existing public rights of way network. No changes to the public right of way's legally recorded direction or width must be made without first securing appropriate temporary or permanent diversion through separate legal process. Alterations to surface, signing or structures shall not be made without prior written permission by Oxfordshire County Council. Note that there are legal mechanisms to change PRow when it is essential to enable a development to take place. But these mechanisms have their own process and timescales and should be initiated as early as possible – usually through the local planning authority.
6. No construction / demolition vehicle access may be taken along or across a public right of way without prior written permission and appropriate safety/mitigation measures approved by Oxfordshire County Council.
7. No vehicle access may be taken along or across a public right of way to residential or commercial sites without prior written permission and appropriate safety and surfacing measures approved by Oxfordshire County Council.
8. Any gates provided in association with the development shall be set back from any public right of way or shall not open outwards from the site across any public right of way.

CASE OFFICER: Caroline Ford

TEL: 01295 221823



Appendix 1

**BICESTER GATEWAY, OXFORDSHIRE  
APPLICATION RE: 20/00293/OUT**

**POSITION STATEMENT ON “AFFORDABLE RENT” FOR COMMITTEE ON 11 MARCH 2021**

**PREPARED BY:**

**R A Cutler BSc (Hons) MSc MRICS MRTPI MBA**

**Partner  
Bloombridge LLP  
4<sup>th</sup> Floor, Venture House  
27-29 Glasshouse Street  
London  
W1B 5DF**

**22 February 2021**

**Final Version**

The Government Rent Standard (April 2020) defines affordable rent as **up to 80% of market rent**. It is therefore not policy compliant for Officers to impose s106 drafting for Bicester Gateway that seeks to require rents at LHA rates (which are often lower than 80% of market rent). Flexibility on rent setting is considered essential by all policy makers – in order to provide additional funding to increase the supply of affordable housing, improve existing stock, meet energy efficiency requirements and, generally, increase the range of affordable needs served. It follows that lower rents (at LHA rates) are not necessarily productive in meeting affordable housing objectives.

Helpfully, the policy (and evidence) in support of defining affordable rent as 80% of market rent is consistent with Cherwell’s Business Plan; where the Strategic Priorities include: delivering affordable housing, raising standards in rented housing, and promoting innovative housing schemes. There is nothing in Cherwell’s Business Plan about restricting affordable rents to LHA rates. Moreover, there is nothing in Cherwell’s Housing Strategy 2019-24; which, on the contrary, seeks to “increase the supply and diversity of affordable housing” through a “degree of flexibility”. There is also nothing in the Local Plan, Tenancy Strategy or any Committee decision to mandate anything other than the policy-compliant flexible approach of up to 80% market rent. In fact, in response to concerns raised by third parties consulted about proposals in the Tenancy Strategy (that sought to limit affordable rents to LHA rates), Councillors were advised in the report to the Executive in March 2017 that:

“With regards to the LHA rates being too prescriptive, our data monitoring of RP rents has shown that a prescriptive approach is *sometimes* [our emphasis] required”

It follows that limiting affordable rents to LHA rates might be prescribed “sometimes”, but not always, or by standard convention, and, in any event, it is clear from the weighty foundation set by policy that such an inflexible approach would need special justification, especially when, with regard to Bicester Gateway, the Planning Committee in July and October 2020 has already recognised, unanimously, that the housing product for the Innovation Community has a ‘live work’ theme and an apartment form that raise issues with service charge affordability and social rent. It follows that **there is no mandate from the Planning Committee, and nothing in policy, to support the imposition of LHA rates at Bicester Gateway**. Such an approach is contrary to all policies – not only Government policy, but also Cherwell’s published corporate, planning and housing policies.

Importantly, however, defining affordable rent in the s106 as “up to 80% market rent” does not rule out LHA rates, nor social rent. But, as policy makes clear, the flexibility at the s106 stage that “up to 80%” offers will help housing delivery, especially for an innovative product like Bicester Gateway, where the investment risks and costs are, by definition, higher than the norm. Put another way, inflexibility is never helpful to delivery.

### **The Point of Disagreement**

It follows that the point of disagreement between Officers and Bloombridge is the drafting in the s106 which seeks to restrict affordable rent to up to 80% of market rent or LHA rates, “whichever is the lower”. It is just these four words. They have the effect of limiting any rental offer to LHA rates whilst ruling out other affordable solutions up to 80% market rent. This is contrary to Government guidance and Cherwell policy.

Paragraph 2.10 of the Officer’s Report to the Planning Committee on 8 October 2020 states that:

- “Social rent is not to be pursued” at Bicester Gateway, and
- **“Affordable rent is the most appropriate tenure for this proposed development”**

This was approved unanimously. There is no mention of a restriction to LHA rates. There is therefore no Committee mandate for the Officers’ approach to the disputed drafting – for good, policy-based reasons (as explained below).

Our view, which we believe is consistent with every Government and Cherwell published document on affordable rent, is that flexibility at the s106 stage is key in order to:

1. Increase the supply of affordable housing (including quality and energy efficiency issues), and
2. Increase the range of affordable needs that development can address, up to 80% market rent.

Put another way, **applying LHA rates is restrictive on supply, quality and the range of needs capable of being served.**

If, under our preferred s106 drafting (“up to 80% MR”), we don’t want to (or cannot afford to) provide affordable housing at LHA rates, then we will have to argue our case when it comes to agreeing the Tenancy Strategy with Officers at the delivery stage (when we have an RP on board). For example, we could seek to provide 100% key worker accommodation, linked to a particular major knowledge economy occupier. We might be able to fund 100% of this at affordable rent (ie all 273 units), but the limitation to LHA rates would prevent the investment altogether.

Officers are clear that they want LHA rates. If we fix these rates now (following Cherwell’s drafting: “LHA rates, whichever is the lower”) and we subsequently need flexibility to provide affordable rented accommodation up to 80% MR, but greater than LHA rates, then we will have to resubmit a fresh application, negotiate a new s106 and take this back to Committee, causing a great deal of further delay. There is no other procedure available to us, as any S106A deed of variation proposal will in all likelihood be rejected by Officers (consistent with their current stance). The current s106 drafting provides no flexibility on viability testing (contrary to Policy BSC3), no flexibility on the 30% of housing, no flexibility on what can be categorised as affordable rent, no flexibility on the mix between affordable rented and intermediate, and no flexibility on phasing. The current drafting effectively requires all affordable rented accommodation to be provided at LHA rates, as these will inevitably be lower than 80% MR.

If Officers are not prepared to accept any flexibility at this stage, how can we, or any investor interested in Bicester Gateway, have any confidence that a revised planning application or a renegotiated s106 would achieve a result different from the standard – at all, or within a reasonable time. Investors always have a choice, and they would choose to invest elsewhere. This is a key reason why Government policy guards against prescribing LHA rates.

In contrast, by defining affordable rent (in accordance with the Government Rent Standard) as “up to 80% MR” we are not precluding LHA rates (which may be 10 - 20% lower than 80% MR). But we cannot accept “up to 80% MR or at LHA rates, whichever is the lower”. Such drafting is too inflexible for this stage of the process. Put another way, the extra 10 - 20% above LHA rates may make all the difference to the viability case, enabling affordable housing to be

delivered within the framework of the s106 without having to resubmit a new application. For the avoidance of doubt, there is no question that up to 80% MR still serves an important affordable need and there is no question that affordable rent is defined as up to 80% MR in both Cherwell and national planning policy.

More generally, **we are disappointed that Officers do not see our scheme as innovative** – it certainly is. There is nothing else like it proposed in Bicester or, to our knowledge, Oxfordshire. Whilst we cannot accept a ‘live work’ user restriction (because this would impose too much occupancy risk and make the scheme unworkable), it is up to Councillors whether they decide to place weight on our innovation community concept in the decision making process. This is worth considering because such an approach might support a decision ‘on its merits’ and help avoid an awkward precedent for other applications, which we know is a concern to Officers. Volume housing sites held under option have much more flexibility around the delivery of affordable housing because they have such a large margin on land value to work with (in contrast, Bloombridge paid market value, with the benefit of planning permission, for the land at Bicester Gateway).

### **What we are Seeking**

There are two possibilities:

1. Either the deletion of “whichever is the lower” in the s106 drafting so affordable rent is defined as “up to 80% Market Rent”, or
2. Acceptance by Councillors that the Innovation Community at Bicester Gateway, as an innovative housing scheme consistent with the Council’s Strategic Priorities, supports approval ‘on its merits’ without the need to restrict affordable rent to LHA rates.

It is for Officers to confirm whether Point 2 is contrary to policy (or even the Tenancy Strategy). We are strongly of the view that our preference, Point 1, accords precisely with Government and Cherwell policy, and the evidence in support of this now follows.

### **The Evidence**

Officers have not provided any policy-based arguments to date, and nothing that is persuasive in any way. Even if the Tenancy Strategy can be established as planning policy (Officers accept it is not), it is clear that the strategy is targeted at governing Cherwell’s relationship with RPs, not developers. **The Tenancy Strategy does not set out to provide detail for s106 obligation drafting and should not be treated as such.** The overall theme of housing policy is the need for flexibility – not the prescriptive approach proposed in our draft s106. The extracts (quoted further below) from Appendix 2 of the March 2017 Executive prove this point conclusively. Flexibility is key.

Government housing policy and the NPPF both seek to broaden the definition of affordable housing in order to drive delivery (through flexibility). So far as the Cherwell Local Plan is concerned, there is nothing in the adopted planning policies that gives any overriding weight to the Tenancy Strategy. Moreover, **there is nothing in the Tenancy Strategy that supports Officers’ belief that, in all circumstances, s106 drafting should prescriptively drive affordable rents to LHA levels, and absolutely no higher.** This belief is contrary to the overarching requirement for flexibility at all levels of policy.

It is also important to consider the mandate provided by the 8 October Committee Meeting:

- 2.10 In this case, social rent is not to be pursued. The nature of a development comprising apartments would incur service charges within communal areas and facilities such as lifts. Affordable rent levels include service charges however social rent levels do not. On this basis, affordable rent is the most appropriate tenure for this proposed development. The intermediate tenure units could be shared ownership, or another form of intermediate tenure such as discount market sales units providing their cost and long-term retention as discounted units remains into the future in accordance with the NPPF definition.

Final Heads of Terms

- 2.45 Taking into account the above comments, Officers recommend that the following Heads of Terms be secured through the S106 for this site:
- The provision of 30% Affordable Housing on site with the mix made up of 70% affordable rent and 30% intermediate tenures.

The clear conclusion from the above extract is: no social rented, 70% affordable rent and 30% intermediate – and paragraph 2.10 (above) states that **“affordable rent is the most appropriate tenure for this proposed development”**. There is no qualifying reference to the Tenancy Strategy, including in relation to the proposed modified definition of “affordable rent”. It seems clear that there is no basis for Cherwell’s Housing Team to revisit their initial comments on the application, including those summarised at page 37 of the July 2020 Committee Report, which were instrumental in the “no social rented” decision, for example:

- In accordance with BSC3 in the Cherwell Local Plan Part 1, all developments proposed at Bicester that include 11 or more dwellings would be expected to provide at least 30% of new housing as affordable homes. This would require 82 homes on this site. Of these, and in line with Policy BSC3, it is expected that 70% should be provided as affordable/ social rented dwellings and 30% as shared ownership. Normal expectations are that affordable housing addresses housing needs and reflects a proportion of property types and sizes. There are also expectations around accessibility and the units should be designed to meet the DCLG Technical Housing Standards – Nationally Described Space Standard. This scheme raises the following concerns:
- The scheme is a fully flatted development and does not offer a mix of housing that is normally required.
- Affordable units would normally be distributed evenly across a site with clusters of no more than 15 dwellings, of which no more than 10 of the dwellings are rented. This would not be possible on this scheme. Blocks are likely to be mixed tenure which can be challenging for RPs to manage.
- The development is aimed at younger entrepreneurs and knowledge economy workers yet qualifying affordable housing tenants are unlikely to fit this profile. Local facilities would need to be accessible.

- To accept flats on a scheme with so much ancillary space (lifts etc), would require an understanding of the predicted level of services charges as this could impact affordability especially for social rent tenants.

It is for these (and other) reasons that social rent was dropped, in preference for (unqualified) affordable rent, and this was agreed by Committee on 8 October. To reiterate, there is no case to revisit the established position now; in fact, prescribing LHA rates in the s106 (and no higher) is very likely to be detrimental to the delivery of affordable housing at Bicester Gateway owing to the viability issues on affordability set out above (eg lifts, ancillary space and service charges, all to be determined, post-outline). Councillors also took the point that, as above, the **“development is aimed at younger entrepreneurs and knowledge economy workers yet qualifying affordable housing tenants are unlikely to fit this profile”**. In this context, limiting affordable rent in our s106 to “the lower of” 80% MR and LHA rates is not prudent as it restricts flexibility and delivery.

There is then the Tenancy Strategy itself. Looking at Section 8, we would reiterate that this is not a planning policy document and it is also out of date given it is meant to be updated annually (para 4.3, page 286, Executive, March 2017). Moreover, it recognises that affordable rent comprises up to 80% MR – for good reasons, which are wider than just tenant affordability in some sectors of housing need, noting the first sentence below on raising funds to build further affordable homes:

## 8. Affordable Rents

### Affordability

#### › Aim

Affordable Rent was introduced in order to raise funds to build further Affordable Homes. Registered Providers can charge up to 80% market rent levels – higher than the social rents previously charged. Affordable rents can be charged in new properties and on a proportion of re-let homes.

This is also explained in the same section as follows:

#### › Capping the level of Affordable Rent

Cherwell District Council continue to support the use of Affordable Rents because we want to see development in the district to meet the housing need of our residents whilst also understanding that Registered Providers have a need to generate income through higher rents to replace public subsidy, which has been lost in current grant programmes.

Section 8 goes on to say that Cherwell **“believe” in capping affordable rent at LHA rates, but this ‘belief’ is not planning policy and it cannot override the accepted definition of affordable rent in**



**NPPF19**, nor is it applicable in every circumstance – or specifically in relation to Bicester Gateway, given the points approved unanimously by Committee. Indeed, there is a suggestion that high rents are seen as an Oxford rather than a Cherwell Valley (ie Bicester) problem:

However, in order that the housing provided still meets local need, we believe that Affordable Rents should be capped at a level to match Local Housing Allowance. We want to avoid a situation where high rents prove a disincentive for people to take up employment or make tenancies which are unsustainable. The Cherwell district falls into two Broad Market Rental Areas for housing benefit purposes, Cherwell Valley and Oxford, of which the rents nearer to Oxford are considerably higher.

There is nothing in the March 2017 Executive report that says that all Section 106 agreements will be capped at LHA rates. On the contrary, it is clear from the Tenancy Strategy that the intention is to discuss these issues with Registered Providers at the appropriate time:

We expect Registered Providers to discuss with us the level of rent it will be reasonable to charge as Affordable Rent. Where Cherwell District Council has invested Capital Funding in a building or acquisition project, the council will have a greater say in the negotiation of rent levels, although we would expect all Registered Providers to charge rents that do not fall outside of the Local Housing Allowance rates for the local area.

It is clear from this that the Tenancy Strategy is a document to guide relationships between Cherwell and the RPs (para 2.1 of the March 2017 Executive). It is emphatically not planning policy, and it is not a planning document. It should not, therefore, appear as standard drafting in every s106 agreement. That is not consistent with the broader approach envisaged by NPPF19, although we are not saying that the current, prescriptive drafting would be inappropriate for large housing sites or, as per the above extract, **where Cherwell has invested capital funding where the Council would then “expect all RPs to charge rents that do not fall outside of the LHA rates for the local area”**. Put another way, capital funding is one way in which Cherwell can achieve its belief that affordable rents should match the LHA, but such matching is not mandatory, and there is no weight of policy, and nothing in the NPPF19, that would support the inflexible application of such a belief. It follows that the Tenancy Strategy carries little if any planning weight. There was no mention of it in the Planning Committee Report in October 2020 and, **in terms of engagement on the Tenancy Strategy**, paragraph 2.7 of the March 2017 Executive (page 284) records that **just “two members of the public responded to the consultation and three RPs”** – hardly a representative or compelling mandate. In addition, having checked the feedback from the two RPs in Appendix 2 of the March 2017 Executive report, two of the four comments specifically support the case we are making:

- “The LHA section was too prescriptive about the level of rent setting in Cherwell”
- “The amount of options for people aged under 35 [eg knowledge economy workers] is somewhat limited” [this is a need addressed by Bicester Gateway]

The response in Appendix 2 to the first of these comments is also supportive of the case (for flexibility) that we are making:

- With regards to the LHA rates being too prescriptive, our data monitoring of RP rents have shown that a prescriptive approach is *sometimes* [my emphasis] required ....”

In short, the prescriptive approach to LHA rent setting currently drafted into the Bicester Gateway s106 is not supported, although it is *sometimes* acceptable, perhaps on large, standard housing schemes. It is not acceptable in the case of Bicester Gateway, as evidenced above.

Lastly on the Tenancy Strategy, it is clear from the monitoring, review and risk sections of the Executive Report that the overall strategy and rents will be kept under review. **Fixing rents to LHA rates in a s106 prevents any rental adjustments in response to these reviews**, making the review worthless and ineffective.

So far as planning policy is concerned, it is clear that the Tenancy Strategy is intended to operate flexibly, and paragraph B108 of the adopted Local Plan also puts an emphasis on delivery and innovative provision. The focus of Bicester Gateway (an innovative project) needs to be on work and the knowledge economy, Councillors accepted this unanimously, and so the s106 drafting must reflect the decision made on 8 October – we respectfully ask that Officers stick to that; and not revert to arguments aired in the report to the earlier Planning Committee in July. Put another way, per paragraph 7.1 of the March 2017 Executive, our comments are intended to ensure that Cherwell’s Housing Strategy is **“investment ready”** as well as helping residents to be **“housing ready”**. Getting the balance right is key. There is no support for a housing strategy at Bicester Gateway based solely on LHA rates (which is what the current drafting prescribes).

## Conclusion

To conclude, Government policy targets strategies to deliver more affordable housing to accommodate a wider housing need than what can be provided by limiting/qualifying affordable rent to LHA rates or, indeed, social rent. We can live with a reference to the Tenancy Strategy, or LHA rates in the s106, but not “whichever is the lower” of 80% MR or LHA – noting that the accepted definition of “up to 80% MR” also encompasses LHA rates in the likely event that they are lower. The current drafting in the s106 is not consistent with Government rent policy, NPPF19, Cherwell’s Business Plan, Housing Strategy and Local Plan, or indeed actions Cherwell may wish to take on monitoring and review of the Tenancy Strategy. Flexibility is key, to aid the delivery of affordable housing.

In terms of actions:

1. Could we please ask that Matthew Barrett is instructed to ensure that the s106 drafting on affordable rent is not prescriptive and correctly reflects Government policy. This will be achieved by deletion of “whichever is the lower”, as set out above.
2. The current s106 drafting also needs to reflect the 8 October Committee Report that says there will be no social rented. This will need to be reflected in Mr Barrett’s drafting, and set out clearly.

It is beneficial to all parties (Cherwell, the RPs and Bloombridge) to have some flexibility. This is consistent with the October 2020 Committee mandate, where paragraph 2.10 states: **“affordable rent is the most appropriate tenure for this proposed development”**. There is no reference to



LHA limitations. In contrast, Officers have sought to rely on the Tenancy Strategy, but this is not planning policy, and it does not say what Officers are claiming it says, as we have evidenced above (by providing direct quotes). **The Tenancy Strategy only supports the application of LHA rates “sometimes” and it is not intended to be prescriptive.** The Tenancy Strategy is available to guide the discussions between Cherwell’s Housing Team and the RPs, not to prescribe an approach at this stage; ie to support inflexible drafting in the s106. Whilst the Tenancy Strategy is a “material consideration” for planning purposes, this does not override policy, or the mandate from the Planning Committee on 8 October. Crucially, a “material consideration” cannot be used as a basis to apply LHA rates prescriptively, all the time, in the face of what the Tenancy Strategy actually says, and contrary to Government and Cherwell policy.

### **Postscript on RP Liability**

Cherwell is looking to impose all s106 obligations and costs onto the chosen Registered Provider. This is not common practice as it puts costs onto organisations which are essentially not for profit. We believe careful drafting between solicitors can address the risks and concerns identified by Cherwell. The advice from CMS, our solicitors, is as follows:

- Wide ranging liability is disproportionate and costly.
- A tightly drafted exclusion so that the RP is only liable for s106 obligations relating to affordable housing is reasonable. The previous draft of the S106 tried to ensure this mechanism could not be exploited if an RP were to develop the whole site. Alternatively, this could also be phrased to apply where an RP takes an interest beyond the Affordable Dwellings. It would be helpful to understand why these proposals are not acceptable to the Council.
- Without the RP liability exclusion, a bond or bank guarantee will be required in order to make the risks of supporting affordable delivery manageable for an RP. This is because Bicester Gateway Ltd is an SPV and so any indemnity from it will be of limited covenant strength. Bank bonds/guarantees are expensive to obtain and service. This will have a corresponding impact on affordability/viability.
- A bond/indemnity is expensive because there is a specific cost attached to it, and disproportionate because in practice the Council would not enforce against an RP. The downside of the indemnity/bond for the developer outweighs the perceived public benefit.
- Many of the obligations (ie landscaping and highway works) will be supported by bonds or deposits. The only perceivable area of risk for the Council is therefore the financial contributions. These are relatively easily enforceable from Cherwell’s perspective. For example, we could consider a provision whereby these contributions are paid in full before occupation, in order to engage the RP liability carveout. If the contributions are not paid before occupation then the payment phasing will remain (as per the current draft) but RP liability will not be carved out and my client will have to obtain the bond/bank guarantee in order to indemnify the RP.

We await feedback on these suggestions.