**Planning Contributions and Affordable Housing Supplementary Planning Guidance: Update Note 1: Policy Implementation Guidance on Affordable Housing Delivery.**

**1 Introduction**

1.1 This note provides guidance on interpreting the council’s planning policies on affordable housing. In particular, it seeks to encourage the provision of affordable housing through “additional” routes rather than relying *solely* on S106 developer subsidy. The Policies have been discussed by the Local Plan Working Party and will in time inform the Local Plan Update. In the interim they are published to set out how the council as Local Planning Authority will interpret some potentially grey areas in the adopted development plan (see below) and Planning Contributions and Affordable Housing Supplementary Planning Document (2022). This paper does not make policy but is intended as an aid to implementing the existing affordable housing policies.

1.2 The areas covered in this note are:

* Affordable housing headline tenures and thresholds
* Viability assessment, assumed profit margins, and additionality to S106
* CIL exceptional circumstances and Mandatory relief
* Vacant Building Credit (VBC)
* Specialist accommodation and non class C3 dwellings.
* Adaptable Homes M4(2)

1.3 Torbay has a pressing need for affordable housing. The most recent Housing and Economic Need Assessment (HENA 2022) indicates a need for at least 387 affordable homes a year for rent, as well as a significant need for shared ownership housing. At February 2025 there were 1,802 households with a local connection on the Devon Home Choice Waiting List for social housing. Just 8% of Torbay’s housing stock is for social rented housing, which is the lowest in Devon.

1.4 Torbay Council’s Policies on affordable housing are set out in Policy H2 of the Adopted Torbay Local Plan 2012-30 (Adopted December 2015). Torbay’s three Neighbourhood Plans (2019) also contain policies on affordable housing. The Planning Contributions and Affordable Housing Supplementary Planning Guidance (SPD) was adopted in December 2022 and provides guidance on the implementation of affordable housing policies.

1.5 The Government published a revised National Planning Policy Framework in December 2024. This gave additional weight to achieving affordable housing in the “planning balance” and increased the emphasis on the provision of social rented housing. (See paragraphs 11(d), 63,64, 66 and page 70). The revised NPPF is a material planning consideration.

1.6 Paragraphs 65 of the NPPF and the National Planning Practice Guidance (NPPG) place restrictions on affordable housing policy, including a requirement for councils to provide Vacant Building Credit. These have not been changed in the December 2024 version of the Framework.

1.7 Early engagement with the Head of Strategic Housing and Delivery is recommended on proposals that are liable for affordable housing.

1.9 This note should be read in conjunction with the Torbay Local Plan 2012-30, Neighbourhood Plans, and the Planning Contributions and Affordable Housing SPD (2022). This note does not make policy but provides advice about how the council will endeavour to interpret existing policies. A full review of affordable housing policies will be carried out through the Torbay Local Plan Update.

**2 Affordable Housing Headline Tenures and Thresholds**

2.1 Table 3.1 (page 30) of the Planning Contributions and Affordable Housing SPD sets out affordable housing thresholds and whether delivery should be on-site or off-site. These will be kept under review, but it is noted that the NPPF (paragraph 65) restricts affordable housing to major residential developments (10 or more dwellings or 1000 sq m floorspace). A lower threshold may be set in the South Devon National Landscape (formerly AONB).

2.2 The SPD also contains the commuted sum levels based on the policy compliant S106 “developer subsidy” towards affordable housing (Table 3.3). The figures are not rounded to the nearest whole dwelling for commuted sum purposes and will be reviewed periodically for inflation.

**3 Tenure Split: Not a ceiling on social rented housing. Delivery through Registered Providers**

3.1 Local Plan Policy H2 and paragraph 3.4 of the SPD seek a tenure mix of 1/3 social rent, 1/3 affordable rent and 1/3 intermediate and other forms of low cost home ownership. The objective of this policy to is to provide affordable housing for rent, not to cap the provision of social housing. The 2024 NPPF revisions have deleted minimum affordable home ownership requirements, and place greater emphasis on social housing. Torbay’s main need is for social rented affordable housing, and this is a material consideration when considering the provision of affordable housing as part of planning proposals. Affordable rent is not always the best product to meet Torbay’s housing needs. Registered Providers also need an element of flexibility in their programmes.

3.2 Accordingly, proposals that provide two thirds (66%) or more affordable housing for rent will be considered to comply with the requirements of Policy H2.

3.3 The council’s preferred way of providing intermediate/low cost home ownership housing remains through shared ownership housing provided by a Registered Provider. The council notes that other arrangements for affordable home ownership may qualify as affordable housing within the revised NPPF definition. However, they present management and marketability challenges. Where applicant wish to promote non-RP forms of affordable housing, they will be required to demonstrate that a workable S106/Unilateral Undertaking is in place that secures the same or better affordable housing offer as would be provided through a policy compliant RP scheme. The Planning Contributions and affordable Housing SPD seeks monitoring contributions towards managing such schemes. The council will keep Government policy under review.

3.4 When determining applications, the council will take into account the need to provide mixed and balanced communities and to avoid concentrations of deprivation, in accordance with Policy H11 “Sustainable Communities”. However, a mix of affordable housing tenures, effective management by RPs, and the pressing need for affordable housing can alleviate potential concerns. Therefore, the starting assumption will be that the provision of affordable housing will help alleviate deprivation in Torbay and help to narrow the gap between the lest and most well off. A lack of affordable housing for local workers is also a barrier to labour flexibility and growth, so the provision of affordable housing will also be seen as an economic benefit.

**4 Viability Assessment and Securing Additionality to S106.**

4.1 Policy H2 and Paragraphs 3.8 (p36) and 5.6 (pp 64-65) of the SPD set out advice about renegotiating affordable housing requirements where development is not viable, subject to an independent assessment of viability (paid for by the developer).

4.2 Paragraph 5.6.3 indicates that a recalculation of viability will be carried out on units that have not been completed within 3 years of the date of permission being granted. The SPD indicates that this means the completion certificate or equivalent. In practice it is likely to be easier to monitor practical completion.

4.3 Where an independent assessment of viability indicates that Policy compliant level of affordable housing is not achievable via S106 “private subsidy”, the Council will seek the following before agreeing to reduce the level of affordable housing:

* A requirement that policy compliant affordable housing will be provided though other sources of subsidy, such as public grant. This will require a S106 agreement (or Unilateral Undertaking) to offer an agreed number of dwellings to a Registered Provider to buy at market value (or minus the value of developer subsidy, if the viability assessment indicates that one can be afforded). If marketed to RPs for at least 2 months with no take-up, then the units may revert to open market dwellings. This route may entail the provision of above policy levels of affordable housing provided through public grant or pooled contributions from smaller developments.
* A renegotiation in Tenure to allow more shared ownership housing. (With the caveat that additional social rented accommodation can be provided through Registered Provider or other public subsidy).
* The provision of essential local worker housing, subject to this being through a specialist provider working in partnership with the NHS or other organisation.

4.4 Early discussion with the Head of Strategy and Housing Delivery is recommended to discuss the provision of affordable housing through additional routes to S106.

**5 Viability Assessment and profit margins**

5.1 Paragraph 5.6.4 of the SPD indicates that if the viability appraisal indicates profits in excess of 20% Gross Development Value, then the developer will be required to pay an additional contribution equal to 50% of the profit above 20% GDV up to the maximum of the full amount of contribution that would have been due. This approach has proven difficult to manage in practice. Moreover, the principal purpose of S106 and affordable housing requirements is to provide affordable housing, rather than to tax profits. Accordingly, the provision of on-site affordable housing through additional grant subsidy will usually be sought in preference to a deferred calculation of viability.

5.2 Where deferred calculation of viability is carried out, the trigger for deferred obligations will need to be agreed by the Head of Strategy and Housing Delivery and the Council’s Legal Services, based upon prevailing market conditions and risks. Paragraph 5.6.4 of the SPD will be treated as an advisory starting point.

6 **CIL Exceptional Circumstances and Mandatory Circumstances Relief**

6.1 The provision of social housing (as defined by the CIL Regulation 49) is eligible for mandatory relief. It **must** be claimed before development is commenced.

6.2 Section 1.8 of the Council’s CIL Accompanying Policies document (current version May 2017) indicates that the council may offer exceptional circumstances relief. Paragraph 1.8.2 and 1.8.3 set out where exceptional circumstances relief may be granted, including where it would assist in the delivery of town centre masterplans. The additional Policies (and main CIL Charging Schedule) note that exceptional circumstances relief is at the council’s discretion, and there must be a S106 Agreement in place.

6.3 It is noted that a relatively small number of brownfield developments are liable for both affordable housing and CIL. In such instances, the council may seek to negotiate above policy compliant levels of on-site affordable housing (including through additionality to S106 routes) and offer CIL mandatory social housing relief.

6.4 It is unlikely that exceptional circumstances relief will be agreed unless there are clear regeneration, affordable housing, or other public benefits. In such instances CIL is likely to take priority.

**7 Vacant Building Credit (VBC)**

7.1 The NPPF (paragraph 65) requires councils to offer vacant building credit (VBC) to support the reuse of brownfield land. Where vacant buildings are being reused or redeveloped, affordable housing contributions should be reduced by a proportionate amount, equivalent to the building’s existing floorspace. VBC does not apply to vacant buildings or abandoned buildings. Additional guidance is set out in NPPG ID: 23b-028-20190315 [Planning obligations - GOV.UK (www.gov.uk)](https://www.gov.uk/guidance/planning-obligations). Authorities should have regard to the government’s intention to incentivise brownfield development and it may be appropriate for them to consider:

* whether the building has been made vacant for the sole purposes of re-development
* whether the building is covered by an extant or recently expired planning permission for the same or substantially the same development.

7.2 **Applying for Vacant Building Credit**. Vacant Building Credit does not require an assessment of viability to be carried out, but is a standalone subsidy aimed at encouraging brownfield development. VBC should be sought when a planning application is submitted. It should constitute part of the planning application, as it is a material consideration in the application. Applications should include evidence that:

* The buildings qualify as brownfield development.
* Existing buildings are vacant (including evidence of the date and reason they became vacant).
* Existing and proposed floorspace, including the area that VBC is claimed for. The council will use gross internal area (GIA) and round areas to the nearest square metre.

The council will consider evidence such as Council tax or rates, CIL forms, and other evidence submitted with a planning application when assessing whether a building has been vacant.

7.3 The NPPF and NPPG leave a number of issues for LPAs to interpret. The following sets out the council’s approach.

7.4 **Vacant Buildings.** The NPPF does not define a vacant building for VBC purposes. Torbay’s general approach is that development should provide CIL or affordable housing. On that basis, the council will apply the CIL Regulations definition of vacant building when considering VBC:

* To be considered vacant for VBC purposes a building should not have been in continuous lawful use for any 6 month period during the last 3 years.
* The whole building must have been vacant, not just a part of it.

7.5 **Other Exclusions from VBC**

* VBC can only be claimed on buildings or parts of buildings where people normally go. So, it excludes areas where people do not normally go, or only go intermittently for the purpose of maintaining or inspecting machinery.
* VBC cannot be claimed on buildings with a temporary planning permission.
* VBC cannot be claimed on rural exception sites where the principle of development is only accepted in order to provide local needs affordable housing

7.6 Sites must be “brownfield”/previously developed within the definition in the NPPF Glossary. Note that this definition excludes agricultural buildings, (structures within) residential gardens, and land where the remains of permanent structures have blended into the landscape.

7.7 VBC will not be applied to buildings that have been made vacant for the sole purpose of redevelopment. In assessing this, the council will have regard to the period of vacancy, planning history, the nature of the previous use and other evidence of why it became vacant. Estate agents’ details, sworn statements and council tax/rates records may also be considered.

7.8 VBC is not applied to abandoned buildings. The Courts have set out the following principles[[1]](#footnote-1) to assess if a building has been abandoned:

* The physical condition of the building;
* The length of time for which the building has not been used for its permitted purposes;
* Whether it has been used for any other purposes; and
* The owner’s intentions.

7.9 VBC will not be applied to building/s that are covered by an extant planning permission, or one that has expired within 5 years of the date that VBC is considered, for the same or substantially the same development.

7.10 VBC does not apply to buildings that have been demolished prior to an application being validated. It should be sought at the time an application is submitted, and will not be applied retroactively.

7.11 In the case of mixed-use developments VBC will be applied on a pro-rata basis of the proposed new floorspace. For example, a scheme that is 40% commercial and 60% residential would apply for 60% vacant building credit.

* 1. **Applying Vacant Building Credit.** Where VBCis accepted, this will be statedon the decision notice. In the case of Outline applications, the council will confirm the principle of VBC and refer to the credited floorspace (as GIA) in the Section 106 agreement. The final deduction will be assessed at reserved matter stage.
  2. VBC will be applied as a proportionate discount to the number of dwellings (or the pro-rata sum for commuted payments) that should be provided under Policy H2 of the Local Plan. The average size of dwellings proposed on site will be taken as a basis for the size of units. Where this is not practical, the council will use the mid-point size of dwellings in the SPD as the basis for the number of units:

1 bedroom dwellings 48 sq m

2 bedroom dwellings 70 sq m

3 bedroom dwellings 95 sq m

4+ bedroom dwellings 109 sq m

It is noted that the Local Plan and SPD resist under-development of sites by providing artificially large apartments. Remaining affordable housing liability will be rounded up to the nearest whole dwelling or a commuted sum sought for the proportion of a dwelling.

**8 Specialist Accommodation and Non Class C3 Dwellings.**

8.1 The council’s affordable housing policies do not refer to any specific Use Class. Therefore its affordable housing policies apply to any accommodation laid out and used as a “dwelling” including those that may fall within Use Class C2, C3, C4 etc. of the Use Class Order[[2]](#footnote-2).

**9** **Adaptable Homes M4(2)**

9.1 Policy H6 of the Local Plan requires 5% of dwellings on sites of 50+ units to be provided as M4(2) Accessible and Adaptable Dwellings. However, in light of Torbay’s aging population this level of provision is unlikely to meet current requirements. Accordingly, all affordable dwellings should be built to M4(2) standard or higher. The council will seek at least 5% of affordable homes to be M4(3) Wheelchair suitable dwellings.

1. Hughes v Secretary of State for the Environment [2000] [↑](#footnote-ref-1)
2. See Rectory Homes Limited and S of S and South Oxfordshire DC [2020]EWHC 2098 (Admin). [↑](#footnote-ref-2)