

London Borough of Southwark
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29 October 2021

41-55 Rotherhithe Old Road London SE16 2PR
Application to vary or discharge the S.106 agreement relating to planning permission
11/AP/0963, as modified by NMA 11/AP/3147

We are instructed by KMP (Surrey Quays) Limited (Company registration No 08866423) (having changed its name from KMP (Harrow) Limited on 29 July 2019), the current owner of 41-55 Rotherhithe Old Road London SE15 2PR (“**the Property**”) as shown on the title plan TGL399193 attached as Appendix 1.

Our client hereby applies (with us acting as agent), to modify the section 106 agreement dated 11 August 2011 in relation to the Property, that was entered into between the London Borough of Southwark and Dina Friedman (“**the Section 106 Agreement**”) in accordance with the provisions set out under s106A of the Town and Country Planning Act 1990 (as amended) (“**the 1990 Act**”) and the Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 as amended (“**the 1992 Regulations**”). A copy of the Section 106 Agreement is attached at Appendix 2.

Our client acquired the Property on 12 May 2014 and is bound by the terms of the Section 106 Agreement as successor in title to Dina Friedman (see office copy entries and filed plan from HMLR for Title Number TGL 399193 attached at Appendix 3).

Modification of the Section 106 Agreement

Any person against whom a planning obligation is enforceable may, after the relevant period, apply to the local planning authority by whom the obligation is enforceable, to have the obligation modified under s106 A (3) (a) of the 1990 Act. The “*relevant period*” is 5 years from the date of the agreement (s106A (4) (b)) of the 1990 Act. As the Section 106 Agreement was completed on 11 August 2011 this application has now been made after the “*relevant period*”.

Where a modification of a section 106 obligation is sought the test set out in s106 A (6) (c) of the 1990 Act needs to be satisfied i.e. “*that the obligation continues to serve a useful purpose equally well if it had effect subject to the modifications specified in the application.*” Case law has defined a useful purpose as being a useful planning purpose (see R (Batchelor Enterprises Limited) v North Dorset District Council 2004).

Relevant to this application, the original purpose of the Section 106 Agreement was to secure affordable housing. It has not been possible to find a Registered Provider (as defined in the Section 106 Agreement) willing to deliver the affordable housing as contemplated by the Section 106 Agreement and it therefore is intended to substitute the obligation to deliver on site affordable housing

contained in the Section 106 Agreement with alternative provisions for the payment of a financial contribution to enable the provision of affordable housing off site. The current provisions of the Section 106 Agreement do not serve that purpose but would serve that purpose if they have effect subject to the modifications proposed in this application.

There is no fee due for this application.

Reasons for the Modification

Because no Registered Provider acceptable to the Council to deliver the on-site affordable housing has been found, not only has no on-site affordable housing been delivered, but also the 50% of the market housing units have also not been able to be delivered. This is a double blow in terms of meeting the acute need for housing, both affordable housing and market housing. The reasons why it has not been possible to find a Registered Provider have been discussed with officers at length and these are two-fold: firstly the small number of shared ownership units are not attractive in terms of management cost and inconvenience to the Registered Providers that are acceptable to the Council, and the “for profit” Registered Provider St Arthur who was willing to deliver the affordable housing was not acceptable to the Council. Accordingly, it is proposed to offer an off-site affordable housing contribution instead.

Southwark policy on off-site affordable housing contributions

For our policy support for this application, we draw on the New Southwark Plan Submission Version. This is shortly to be adopted and hence should be accorded full weight in the planning balance. Supporting policies include SP1 which sets a target of 23,550 new homes in the period 2019/20 to 2028/29, and a target of delivering 11,000 new council homes by 2043. The proposed amendment of the Section 106 Agreement will both go towards meeting the 23,550 target by releasing the 50% of the market units held back under the current Section 106 Agreement, plus 6, and the off-site contribution will go towards delivering 11,000 new council homes.

Policy P1 allows payment in lieu in exceptional circumstances. We submit that the inability to find a Registered Provider acceptable to the Council to deliver the affordable housing on-site is just the sort of exceptional circumstance the policy is intended to address.

Viability Appraisal

The amount of the affordable housing contribution is justified by the Viability Appraisal attached at Appendix 4. This is consistent with Policy P1 which requires the maximum viable amount of affordable housing.

Proposed Modification

We would propose the following amendments to the Section 106 Agreement:

1. The deletion of Schedules 5, 6 & 7.

2. The deletion of paragraph 1.2 of Schedule 2 and replacement with the following obligation:

“1.2

The Developer covenants with the Council and undertakes to the Council so as to bind the Site to pay the Off-site Affordable Housing Contribution to the Council prior to the date of Occupation of more than 50% of the Remaining Units and not to Occupy or permit Occupation of more than 50% of the Remaining Units until the Off-site Affordable Housing Contribution has been paid”.”

3. The deletion of the definition of the following redundant definitions “Affordable Housing”, “Affordable Housing Units”, “the Approved Affordable Housing Mix”, “Dispose”, “Habitable Rooms”, “Intermediate Rented Housing”, “Registered Provider”, “RSL Mortgage Duty”, “Shared Ownership Units”, “Shared Ownership Terms”, and “Staircasing” in their entirety.
4. The deletion of the definition of “Remaining Units” and replacement with “*the Dwellings forming part of the Development*”.
5. The addition of a new definition of Off-site Affordable Housing Contribution as follows:

“Means the sum of £1,200,000 (one million and two hundred thousand pounds) to be paid by the Developer in accordance with Part 1 of Schedule 2 hereof and to be applied by the Council towards the provision of off-site affordable housing within the London Borough of Southwark and which shall be subject to indexation under clause 13 amended so that X is the Index figure on [date] not the date of the Section 106 Agreement”.

6. The addition of a new paragraph 1.6 to Schedule 4 as follows:

“1.6 The Council covenants that it will expend the Off-site Affordable Housing Contribution towards the provision of off-site affordable housing within the London Borough of Southwark”

We conclude this would appropriately serve the relevant purpose of the Section 106 Agreement.

A formal application to modify the planning obligations contained within the Section 106 Agreement under s106A(3) (a) of the 1990 Act accompanies this letter and is attached at Appendix 6.

In addition, a separate application has been made for a non-material amendment to the approved plans. This application does not change the building or the plans but simply deletes the Schedule that identified different units as either private or intermediate to make them consistent with this application which will omit the requirement for any intermediate units.

If the Council have any queries or require any further information to determine the application, then please do not hesitate to get in touch.

Yours faithfully



Sebastian Charles

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List of Application Documents

1- Location Plan

2- Section 106 Agreement dated 11 August 2011

3- Office copy entries and filed plan from HMLR for Title Number TGL399193

4- Financial Viability Assessment prepared by Strettons dated 18 October 2021

5- Financial Viability Assessment prepared by Savills

6- Application s106A Town and Country Planning Act 1990