

**Hill Residential Limited**

**Section 106 Agreement in relation to Land to the West of Lytton Way, Stevenage**

**Explanatory Note**

**Appeal Ref: APP/K1935/W/20/3255692**

**1. INTRODUCTION**

- 1.1. This note has been prepared by HCR Hewitsons on behalf of Hill Residential Limited (“Hill”) in order to explain the terms and effect of a Section 106 Agreement between (1) Stevenage Borough Council, (2) Hertfordshire County Council, (3) Hill and (4) Lloyds Bank Plc in relation to land to the West of Lytton Way, Stevenage (“the Section 106 Agreement”). It is intended to provide guidance to the Planning Inspector in the determination of Hill’s appeal against Stevenage Borough Council’s (“the Council”) refusal of their application reference 19/00474/FPM submitted on 8<sup>th</sup> August 2019 and refused on 6<sup>th</sup> March 2020 which has been allocated appeal reference APP/K1935/W/20/3255692 (“the Appeal”)
- 1.2. The Appeal relates to a proposed development involving the demolition of the existing office building (Use Class B1) and structures, and the construction of seven apartment buildings comprising 576 dwellings (Use Class C3) together with internal roads, parking, public open space, landscaping, drainage and associated infrastructure works on the land to the West of Lytton Way, Stevenage (“the Application Site”).
- 1.3. This note is intended to provide an overview of the main terms of the Section 106 Agreement as they stand as at 14<sup>th</sup> July 2021 and will need to be read alongside the Section 106 Agreement for a detailed understanding of the provisions.

**2. EFFECT OF THE AGREEMENT**

- 2.1. The Section 106 Agreement will bind Hill’s interest in the Application Site and the obligations will be passed to their successors in title (Clause 3.4). The Council wished to use the planning application red line plan for the purposes of the Section 106 Agreement, but a small part of the site is in the ownership of Eastern Power Networks and Thames Water Utilities, and therefore it has been necessary to carve these interests out of the definition of “Application Site”.
- 2.2. The Section 106 will be registered as a local land charge (Clause 16.1). Upon the satisfaction of terms of the Section 106 Agreement, the Council must confirm discharge of the obligations and update the local land charges register accordingly (Clause 16.2 & 16.3). There is the usual release clause for those who dispose of their interest in the whole of the Application Site (save for any liability for a subsisting breach), but only the Council was prepared to allow for release on disposal of the relevant part of the Application Site (Clause 11.5) save for obligations restricting use and occupation on the retained land. The

obligations in favour of the County Council will, therefore, continue to be enforceable until such time as a party has disposed of their entire interest in the Application Site.

- 2.3. The obligations in the Schedules to the Section 106 Agreement are conditional upon grant of the planning permission and commencement of the development (excluding certain preparatory works) (Clause 4.1). The obligations will fall away if the planning permission is quashed or revoked for any reason (Clause 11.4). The Agreement will apply to the planning permission that is granted pursuant to the current application and any s73 variation to it, but no other planning permission (Clause 11.6 & 13.1).
- 2.4. There is a “blue pencil” clause at Clause 4.3 which enables the Planning Inspector to determine that any of the obligations in the Section 106 Agreement do not meet the CIL Tests/NPPF and accordingly that they will give them no weight in determining the Appeal, in which case the obligation(s) cease to have effect. There is also provision for the Planning Inspector to conclude that a particular payment obligation should be amended in order to ensure compliance with the CIL Tests/NPPF, in which case the obligation(s) shall be treated as amended in accordance with that decision.

### **3. THE OBLIGATIONS**

The obligations in the Section 106 Agreement are as follows:

#### ***Affordable Housing (Schedule 1)***

- 3.1. To provide 52 Affordable Rented Housing Units in accordance with Building Regulations and Homes England requirements. The Section 106 Agreement specifies an “Agreed Mix” at para. 2.3 and the location of the units is shown on the plan at Appendix 4. There is also a requirement to submit an Affordable Housing Scheme for approval prior to commencement.
- 3.2. The affordable units must be provided and transferred to the Registered Provider prior to occupation of more than 50% of the market units. Para. 5 requires negotiations for the transfer of the affordable units to be begun prior to commencement of the development and the identity of the Registered Provider to be approved by the Council.
- 3.3. The affordable units must be transferred (by way of the freehold or 125 year leasehold interest) with vacant possession, with all necessary rights of access and services and in a Serviced Condition, and there is a requirement for the affordable housing provider to enter into the Council’s standard nominations agreement(s) attached at Appendix 3.
- 3.4. There is a requirement for the affordable housing units to be occupied as the sole private residence by those who are eligible for affordable housing and in accordance with the nominations agreement. The units must be let and occupied in accordance with the affordable housing scheme. Any Affordable Rented Housing shall only be let at an Affordable Rent and, should any such tenures be provided following a viability review, any Social Rented Housing shall only be let at a Social Rent. Any shared ownership units must be disposed of at an initial share of between 25% and 75% and the rent payable must not amount to more than 2.75%.

- 3.5. There are the usual exclusions for those who exercise their right to buy or staircase out and for mortgagees in possession (subject to a requirement to give 3 months notice to the Council first of all). There is a requirement for the Registered Provider to use reasonable endeavours to use any money received from the sale of any affordable units for other affordable housing projects within the District.

***Viability Reviews (Schedule 7)***

- 3.6. The Section 106 Agreement includes provision for numerous viability reviews, namely where the Substantial Implementation Target Date (24 months from grant of planning) is not achieved (the early stage review), immediately following sale of all dwellings within the second block, immediately following sale of all dwellings within the fourth block (the mid stage reviews), the date on which 90% of the dwellings have been disposed of (the late stage review) and where there is a “Substantial Delay” (a period of 12 months in which no substantive progress has been made on the development according to a development programme to be approved by the Council prior to commencement). Hill’s position is that there is no need for the mid stage reviews given that this scheme is not expected to be built out over a long period and therefore conditions are unlikely to change so substantially to materially affect the viability position – it is expected that it will be built out in less than 3.75 years. Similarly, Hill is of the view that there is no need for a viability review to be undertaken in the case of a Substantial Delay; such a review will simply further delay the development and, in reality, will only be triggered if the housing market slows down and it is no longer viable to proceed. Hill will ask the Planning Inspector to utilise the “blue pencil” clause to amend the Agreement accordingly.
- 3.7. In terms of the early stage review, any “Surplus Profit” must be used towards the provision of additional on-site affordable housing, although the Council can agree to a contribution in lieu of on-site provision where that is not feasible (for instance where the number of units is too small or where it will be difficult to manage the additional units due to their location). In terms of the mid stage reviews, 60% of any Surplus Profit must be used towards the provision of additional affordable housing, although again the Council can agree a contribution in lieu of on-site provision. In terms of the late stage review, a contribution equivalent to 60% of any Surplus Profit must be paid within 10 working days and prior to occupation of more than 95% of the dwellings. In terms of the substantial delay review, 60% of any Surplus Profit must be used towards the provision of additional affordable housing, although again the Council can agree a contributions in lieu of on-site provision. These are all subject to an “Affordable Housing Cap” of 105 units with a specified preferred mix.
- 3.8. The procedure governing the viability reviews are largely the same for each review and are as follows:
- 3.8.1. To notify the Council that the trigger for a review has been reached within 10 working days (or not less than 20 working days beforehand in the case of the mid and late stage reviews) and to provide the Council with evidence of substantial implementation or substantial delay where relevant.

- 3.8.2. To provide the Council with any further evidence they may require to establish whether substantial implementation or substantial delay has occurred and allow them inspect the site where relevant.
- 3.8.3. Where a review is triggered, a viability review must be submitted within 20 working days together with supporting information. Any review will use the same assumptions and methodology as stated in the note dated June 2021 prepared by Quod in connection with the Appeal.
- 3.8.4. The Council will then assess whether Surplus Profit is available to provide additional affordable housing/in lieu contributions and may appoint an External Consultant and request further information within 10 working days. Where there is a dispute as to the outcome of the review, there is provision for it to be referred to dispute resolution.
- 3.8.5. Where additional affordable housing is to be provided an updated Affordable Housing Programme to deliver the additional units must be submitted within 10 working days and implemented. This will set out the location, number, sizes and tenures of the affordable units.
- 3.8.6. The costs of the Council assessing the viability review must be paid within 20 working days of a request for payment.
- 3.8.7. Any in lieu contribution must be paid within 10 working days of the Council's decision that it will accept such a contribution and there is a restriction on the late stage review trigger that no more than 95% of the dwellings can be occupied until the contribution has been paid.

### ***Open Space (Schedule 2)***

- 3.9. There is a requirement to obtain the Council's approval to an open space specification and open space management plan prior to commencement of the development – the open space is shown on the plan at Appendix 6.
- 3.10. The open space scheme will set out the timetable for the provision of the open space, although there is a requirement that the amenity space located next to Block 7 is delivered prior to first occupation of the development. The open space must be maintained in accordance with an approved management plan until it is transferred to a Management Company.
- 3.11. The transfer to the management company will be for £1, legal fees must be paid and details will need to be provided to the Council as to how maintenance will be funded, together with a copy of the transfer. The transfer must be free from encumbrances, with all necessary rights and easements and subject to restrictive covenants on the use of the open space. There will be covenants requiring its maintenance and prohibiting transfer to the individual owners of the development. There is a requirement to include a requirement to contribute to maintenance of the open space in the transfers/leases of the dwellings.

***Financial Contributions (Schedules 3, 4, 6 and 8)***

- 3.12. There is a requirement to pay the following financial contributions:
- 3.12.1. Primary Education Contribution of either £907,676 or £1,670,732, to be determined by the Planning Inspector. Hill's position is that such a contribution cannot be justified, but if it is payable it should be the lesser sum of £907,676, whereas the County Council have requested £1,670,732. 50% of this contribution will be payable on commencement and 50% on first occupation of the 200<sup>th</sup> dwelling.
  - 3.12.2. NHS Contribution of £81,538 –50% of this will be payable on commencement and 50% on first occupation.
  - 3.12.3. Residential Travel Plan Evaluation and Support Contribution of £6,000 which is payable on first occupation of the development.
  - 3.12.4. Sustainable Transport Contribution of £266,075 which is payable on first occupation of the development. Hill's position is that the County Council have failed to justify their request for this contribution and they will be asking the Planning Inspector to strike it out by way of the "blue pencil" clause.
  - 3.12.5. Car Club Contribution of £22,574 which is payable prior to commencement of the development.
- 3.13. The financial contributions are subject to indexation in accordance with Clause 7.2. Interest at 4% above the Co-op base rate is payable in the event of late payment.
- 3.14. The Councils are obliged to use the financial contributions for the stated purpose and to repay them if they are not spent within 10 years and there is a requirement for the Councils to provide evidence of the same (Clause 6).

***Fire Hydrants (Schedule 5)***

- 3.15. The Section 106 Agreement requires a "Water Scheme" incorporating fire hydrants in accordance with BS 750 (2012) to be approved prior to commencement of the development. Draft Condition 30 also covers fire hydrants and the inspector will be asked to delete one or the other.
- 3.16. That scheme must then be implemented and the Fire and Rescue Service must be notified when every fire hydrant becomes operational.
- 3.17. The hydrants must then be maintained in a good condition until they are adopted by the Fire and Rescue Service.
- 3.18. The dwellings cannot be occupied until they are served by an operational fire hydrant.

### ***Travel Planning & Highway Improvements (Schedule 6)***

- 3.19. Other than the requirement to pay the financial contributions referred to above, there is a requirement to obtain the County Council's approval to an amended Travel Plan and Travel Plan Coordinator prior to first occupation of the development. Draft Condition 24 also covers requirements for a Travel Plan and in the view of Hill is to be preferred.
- 3.20. There is a requirement to obtain the County Council's approval to a Resident Travel Pack and details of the Sustainable Travel Voucher (£50 per flat and £100 per house) no less than 3 months prior to first occupation and to provide them to each dwelling within 1 month of occupation. Hill's position is that the County Council has failed to justify the request for a Sustainable Travel Voucher and they will ask the Planning Inspector to strike this out using the "blue pencil" clause.
- 3.21. There is a requirement to carry out baseline surveys and obtain the County Council's approval to an updated Travel Plan within 3 months of first occupation and within 3 months of occupation of the 75<sup>th</sup> dwelling.
- 3.22. There is a requirement to comply with, promote, implement and review the travel plan at all time during the occupation of the development, and to include in all leases or licences a requirement to comply with the Travel Plan.

### ***Car Club (Schedule 8)***

- 3.23. Other than the requirement to pay the financial contribution referred to above, there is a requirement to provide the two car club spaces shown on the plan at Appendix 6 and provide the Council with a copy of a contract entered into with the car club operator for the use of the spaces, prior to first occupation.

### ***Trees & Plants (Schedule 9)***

- 3.24. There is a requirement to ensure that any trees and plants on the Application Site are acquired from nurseries located in England and Wales for a 5 year period unless otherwise agreed with the Council.

### ***Highway Improvements (Schedule 10)***

- 3.25. There is a requirement to enter into a Highway Agreement for the completion of the Highway Improvements listed in the Section 106 Agreement and shown on the drawings appended to the Agreement prior to first occupation. Hill's position is that the County Council has failed to justify its request for works for the upgrading of the two bus stops on Lytton Way and they will ask the Planning Inspector to strike out this requirement pursuant to the "blue pencil" clause.

### ***Other Obligations***

- 3.26. There is an obligation to pay a monitoring fee of £25,000 on commencement of the development (Clause 5.1.4). Hill and the Council have agreed that, in line with the Council's

adopted SPD, this will be reduced to 2.5% of the total contributions in the event that the Primary Education Contribution ceases to have effect pursuant to the blue pencil clause.

- 3.27. There is the usual provision to pay the Councils' legal costs of dealing with the s106 Agreement (Clause 5.1.5).
- 3.28. There is an obligation to give the Councils no less than 5 working days notice of commencement of the development, first occupation, occupation of 50% of the market units, occupation of 75% of the dwellings, occupation of the 199<sup>th</sup> dwelling, occupation of the last dwelling and issue of a Certificate of Practical Completion (Clause 5.1.6).
- 3.29. There is an obligation to notify the Council within 10 working days of any change in ownership of the site, excluding disposals of individual units, to statutory undertakers and mortgages and charges (Clause 9).
- 3.30. There is a requirement to permit the Council to enter the Application Site to verify whether there has been a breach of the Agreement, subject to them giving reasonable notice and complying with H&S requirements and excluding the occupied dwellings (Clause 11.7).

#### **4. GENERAL PROVISIONS**

- 4.1. There is a clause to exclude statutory undertakers, the Registered Provider and those benefitting from an easement or licence in the site only from liability under the Section 106 Agreement, other than in terms of the affordable housing provisions (Clause 11.8). Owners and occupiers of the individual dwellings are also excluded from liability in relation to the Council obligations (save for those restrictions on use and occupation), although the County Council was not prepared to accept such a provision in relation to their obligations.
- 4.2. There is a warranty from Hill that no other party (other than the two statutory undertakers and Lloyds Bank Plc) have any interest in the site (Clause 11.1). They also covenant not to encumber the Application Site so as to render the obligations in the Section 106 Agreement impossible to carry out (Clause 5.1.3)
- 4.3. There is the Council's standard dispute resolution clause providing for expert determination which will be final and binding (Clause 12).
- 4.4. There is a mortgagee clause to provide that Lloyds Bank Plc will only be liable for the obligations in the Section 106 Agreement if they go into possession of the Application Site (Clause 21).

**HCR HEWITSONS**

**GJD/82835-150**

**14<sup>th</sup> July 2021**