

### **Introduction**

1. Planning permission was granted on 18 February 2016 (Ref: 2014/1617/P) by Appeal for the following development at the 100 Avenue:
  - a. *Demolition of the existing building and redevelopment with a 24 storey building and a part 7 part 5 storey building comprising a total of 184 residential units (class C3) and up to 1,041sqm of flexible retail/financial or professional or café/restaurant floorspace (classes A1/A2/A3) inclusive of part sui generis floorspace or potential new London Underground station access fronting Avenue Road and up to 1,350sqm for community use (Class D1) with associated works including enlargement of the existing basement level to contain disabled car parking spaces and cycle parking, landscaping and access improvements.*
2. Alongside this planning permission, a legal agreement was completed in accordance with Section 106 of the Town and Country Planning Act 1990 (as amended), and was entered into on 24 August 2015.
3. Clause 3.2 of the S106 Agreement relates to the provision of affordable housing. Currently this requires the provision of 36 units (8 intermediate and 28 affordable rent) on a permanent basis and 18 units as discounted market rent for 15 years from practical completion of each unit.
4. In accordance with Section 106A of the Town and Country Planning Act 1990 (as amended), a modification of this obligation is now sought. With specific reference to S.106A(3) and S106A(6), it is noted that more than 5 years have passed since the agreement was made and that the proposed modification will ensure that the modified obligation will serve its purpose equally well relative to the existing wording.
5. Specifically, the modification will revise the provision of affordable to offer 18 units (10% of the development) as discounted market rent units in perpetuity. This modification will ensure that the development continues to provide the maximum reasonable amount of affordable housing consistent with planning policy and the delivery of a viable scheme, as per the original intent of the obligation.
6. No other changes to the scheme are proposed and the planning permission itself will be unaffected by this change to the associated legal agreement.

### **Context for the Proposed Amendment**

7. This development has experienced an extended period of consideration since the planning application was first submitted. This can be summarised as follows:

<b>Date</b>	<b>Matter</b>
18 March 2014	Registration of the planning application
March 2014	Date of the original viability assessment that underpinned the proposed development
August 2014	Completion of BPS' independent assessment, on behalf of the London Borough of Camden, of the submitted viability report

	- Confirmed that the maximum viable affordable housing provision was 25%
September 2014	Increase in affordable housing offer, beyond agreed viable position
3 October 2014	Application refused, following decision by planning committee members to overturn officers' recommendation of approval
18 December 2014	Submission of planning appeal
30 January 2015	Formal start of planning appeal
14 July – 10 August 2015	Appeal public inquiry sits
24 August 2015	Section 106 Legal Agreement completed
23 September 2015	Completion of Appeal Inspector's Report to the Secretary of State
18 February 2016	Issue of the Secretary of State's decision, confirming the grant of planning permission
6 May 2017	Request for judicial review of the Appeal decision dismissed
25 June 2017	Request made for a judicial review of the LPA's decision to discharge Condition 31 (method statements for subterranean works)
25 October 2017	Request for judicial review of the decision to discharge Condition 31 dismissed
8 February 2018	Certificate of Lawful Existing Use (CLEUD) granted confirming lawful implementation of planning permission through limited demolition
19 July 2018	Approval of S106 obligation requiring a Construction Management Plan prior to substantial demolition and construction commencing deferred by planning committee
22 November 2018	Approval of S106 obligation requiring a Construction Management Plan prior to substantial demolition and construction commencing given by planning committee
February 2019	Commencement of substantial demolition and below ground works
May 2020	Dismissal of request for judicial of the decision to approve the Construction Management Plan, final confirmation that works can continue
3 February 2020	Approval of revised Construction Management Plan
Present Time	Works to complete subterranean elements and the ground floor slab have been completed. Further works above ground level are currently paused

8. As a result of this extended and unanticipated timeline, 6.5 years have elapsed since the original viability assessment of the proposed scheme was undertaken. In that time, economic and market conditions have changed markedly and significant additional costs on the development have accrued.
9. The situation has been further exacerbated by the impact of the Covid-19 pandemic in 2020.
10. At the time of the original planning submission, it was proposed that 25% of the total residential floorspace would be affordable. In terms of units, this equated to 36 units out of the total of 184 residential units on-site (in line with policy expectations, a larger proportion of the affordable units was proposed as larger units than within the market elements).
11. Following independent review, it was agreed that this was the maximum level of affordable housing that could

viably be provided.

12. Irrespective of that agreed position on viability, in negotiation with officers Essential Living agreed to increase the affordable housing offer to include an additional 18 units on the basis of Discounted Market Rent being applicable for 15 years.
13. At the point of the original determination in October 2014, the development therefore proposed a level of affordable housing in excess of that required by policy and offered a contribution greater than the maximum level considered to be viable when tested.
14. This contribution has not been altered since that time and was secured through the completion of the S106 legal agreement in August 2015. This agreement also secured a range of review mechanisms such that if the development value increased then additional contributions to affordable housing would be required.
15. Today, the economic situation for Essential Living is very different to that in 2014. Not only has the planning process resulted in considerably greater costs than expected in terms of both time and finance, but the recent unprecedented economic upheaval has significantly changed the economic situation.
16. It should also be noted that the development has throughout included the provision of a community facility. It has been acknowledged by the Council since 2014 that the removal of that element would allow for additional affordable housing to be provided. However, Essential Living remain committed to provision of the community facility due to the many planning benefits that arise despite the impact that this has upon viability.

### ***Current Viability***

17. The original viability assessments supporting the consent did not reflect build to rent methodology or the consented affordable housing package - which included 18 discounted market rent homes in Block B.
18. In 2014, the viability assessments that informed the consent valued the market homes as market sale rather than market rent. At the time, build to rent assessment methodology was in its infancy. Subsequent GLA guidance set out within the *Homes for Londoners: Affordable Housing and Viability SPG 2017* has acknowledged that Build to Rent schemes typically perform less well than Market Sale schemes. The combined effect of the above factors and the additional 18 affordable homes was that the 2014 reports overstated the viability of the scheme.
19. Since the original assessment construction costs have increased by £50.4m (from £58.3m in the viability assessments) to the current construction cost at £108.7m.
20. Appraisals of the current consent, even where these do not take account of the costs of works to date, produce a negative land value and do not enable the applicant to make a return on the project.
21. In summary, in its current form the scheme is unviable and cannot be delivered. This would mean that the delivery of 184 residential units, an enhanced retail offer, the opportunity for an improved entrance to the underground station and the purpose-built community space will not be brought forward.

### ***Proposed Revision to the Current Legal Agreement***

22. To allow for the existing S106 Agreement to be updated, the following changes to the current wording of the obligations and related definitions are proposed:
  - *The amendment of clause 3.2.1 and clause 3.2.2 by the deletion in each case of reference to “the Intermediate Housing Scheme”;*
  - *The amendment of clause 3.2.3 by:*

- *The deletion of the term “Affordable Housing Units” and its replacement by the term “Discounted Market Rent Housing Units”;*
- *The deletion of the term “Affordable Housing” and its replacement by the term “Discount Market Rent Housing”;* and
- *The deletion of the words “in accordance with the specification approved by a Registered Provider”;*
- *The deletion of clauses 3.2.4, 3.2.5, 3.2.6 and 3.2.7;*
- *The amendment of clause 3.2.10 to read*
  - *“the Owner shall ensure that the Discounted Market Rent Housing Units shall not be otherwise used or Occupied and shall be retained for no purpose other than for the provision of Discounted Market Rent Housing unless otherwise agreed in writing by the Council Provided Always that this restriction shall not prevent the Owner from disposing of all or any of the Discounted Market Rent Housing Units with the burden of such restriction”;*
- *The deletion of clause 3.2.11;*
- *The deletion of the following definitions, namely:*
  - *Affordable Housing Units,*
  - *Affordable Rent Housing,*
  - *Affordable Rent Housing Units,*
  - *Discounted Market Rent Period,*
  - *Intermediate Housing,*
  - *Intermediate Housing Scheme,*
  - *Intermediate Housing Units,*
  - *Registered Provider; and*
  - *Shared Ownership,*
- *The amendment of the Discounted Market Rent Housing Units Marketing Plan definition by the deletion of the term “Discounted Market Rent Period”,*
- *The amendment of paragraph (a) of the Disposal Viability Assessment definition by the deletion of the term “Affordable Housing Units” and its replacement by the term “Discounted Market Rent Housing Units” and the amendment of paragraph (a)(i) to refer to a copy of the Original Viability Assessment showing the gross development value of the Development as ONE HUNDRED AND FORTY FOUR MILLION POUNDS (£144,000,000); and*
- *The amendment of the Original Viability Assessment definition to read as means the viability assessment for the Development undertaken by Savills on behalf of the Owner and submitted to the Council on (18 December 2020);*
- *The amendment of the Post Construction Viability Review definition by the deletion of the term “Affordable Housing” and its replacement by the term “Discounted Market Rent Housing Units” and*
- *The amendment of the Surplus definition to read means a positive figure produced from (as appropriate) (a) a Post Construction Viability Review pursuant to clause 3.16 of the Agreement or (b) a Disposal Viability Assessment pursuant to clause 3.15 of this Agreement where in either case the gross development value is confirmed as being greater than £144,000,000 (ONE HUNDRED AND FORTY FOUR MILLION POUNDS)*

## ***Planning Analysis***

23. The statutory test to be applied when determining the acceptability of an application to amend an S.106 obligation is set out in S.106A(6)(c) of the Town and Country Planning Act 1990, namely where the (original) obligation continues to serve a useful purpose, whether the obligation sought by the application would serve the purpose (of the original obligation) equally well if it had effect subject to the modification specified in the application.
24. In this case it is possible to view the purpose of the existing S.106 deed either:
  - a. as a document which secures a range of planning benefits including affordable housing, a purpose built community space, capacity for an upgraded entrance to the underground station and contributions for education, employment and training, public art, public realm improvements and cycling infrastructure; or
  - b. more narrowly as a document which, for the purpose of the amendment to the affordable housing obligations sought by the application, secures the maximum reasonable amount of affordable housing consistent with policy and the delivery of a viable scheme.
25. Under either scenario the proposal the subject of this application satisfies the test set out in S.106A(6)(c) as it meets the purpose of the original obligations equally well.
26. At the time that planning permission was originally granted, the Secretary of State confirmed the appointed Inspector's assessment that great weight should be attached to the housing provision proposed by the development and that the provision of a purpose-built community facility was a significant benefit when assessing the planning balance during the application's determination. Delivery of both of these elements (together with the other elements of the development) would provide for sustainable development.
27. This aspect of the approved development has not altered; the delivery of this scheme provides significant planning benefits and will contribute to the sustainable development of the Borough.
28. The Secretary of State also confirmed that, in providing the maximum contribution possible regarding the viability of the scheme, the approved development offered a policy compliant provision of affordable housing.
29. This position was agreed by the Council and followed independent assessment by the Council's appointed assessor. At that time, this reflected the requirements of adopted policies CS6 and DP3. Although these policies have now been superseded by the replacement Local Plan adopted in 2017, the same principle is maintained today through policy H4.
30. This approach also reflects the approach to viability in considering affordable housing contributions set out within Section 5 of the National Planning Policy Framework (NPPF) and supported by the relevant sections of the government's Planning Practice Guidance on viability. This is clear that updated site circumstances and viability information can be taken into account as part of ensuring that development can continue to deliver the widest range of planning benefits.
31. The purpose of Clause 3.2 of the legal agreement is to ensure that the development delivers the maximum reasonable amount of affordable housing consistent with both the requirements of planning policies and the delivery of a viable scheme. The inter-relationship between these two arms is key; if a scheme cannot be delivered viably then it will not be able to deliver the maximum reasonable amount of affordable housing.
32. If economic conditions change compared to those in existence at the time when the original viability assessment upon which the clause is based was undertaken, it is reasonable to consider whether the clause as currently written can continue to ensure both of these elements are deliverable.
33. The existing legal agreement includes provision for a review of the affordable housing contribution at the

conclusion of the development project, to allow for an additional contribution to be made if the viability of the development has improved over time. This provision ensures that the development continues to be policy-compliant by providing the maximum contribution to affordable housing with regard to the viability of the scheme.

34. What this approach does not allow for is a scenario where viability worsens to an extent that the development is no longer viable and cannot be delivered. This reflects that in a normal scenario, where development is no longer viable it will simply not be brought forward.
35. Essential Living do not find themselves in a normal scenario. Despite the significant delays and cost increases faced, they remain committed to developing this project. As a Build to Rent developer, Essential Living recognise the importance in investing in space and place, and wish to remain involved in the active management of the site for decades to come.
36. The amendments now proposed will still be compliant with the requirements of Policy H4 to provide the maximum contribution towards affordable housing with regard to the viability of the proposed development. Indeed, the applicant is prepared to go beyond this point and offer some affordable housing units beyond the maximum required by the viability assessment in the same way that was the case when permission was originally granted.
37. Moreover, this amendment will not alter the existing purpose of Clause 3.2 within the legal agreement. The obligation will still secure the maximum contribution to affordable housing from the development, as was always intended, albeit the overall contribution will differ due to the changed circumstances with regard to the scheme's viability that now exist.
38. As per the requirements of S106A(6), the modification proposed will ensure that Clause 3.2 will continue to serve its original purpose equally well. The purpose was to deliver the maximum contribution whilst maintaining the viability of the scheme to deliver the widest range of planning benefits; this modification will not change this purpose but will support the viability of the development and its ability to be delivered in much changed economic circumstances 6.5 years after the initial assessment of viability was made.
39. The modification promoted by the applicant will facilitate the delivery of a viable development on this site, the continuation of development on this site and the significant planning benefits of housing delivery and provision of community facilities on-site. The only rational mechanism for addressing the overwhelming viability issue identified in the updated Savills Viability Assessment is the adjustment of the planning obligations and related definitions referred to in this document.
40. The applicant is content to maintain the existing obligations pursuant to which the development can be subjected to further review at the completion of the project to ensure that in a scenario where viability improves the development may provide for a policy-compliant contribution.

### **Summary**

41. In accordance with Section 106A, subsections (3) and (4), of the Town and Country Planning Act 1990 (as amended) it is proposed to amend planning obligations and related definitions within the existing legal agreement relating to approved development ref: 2014/1617/P in order to amend the agreed contribution towards affordable housing.
42. It is proposed to revise the agreed contribution to now provide 18 units (10% of the development) as Discounted Market Rent in perpetuity.
43. Without this change, further progression of the approved development cannot proceed. In simple terms, it will not be economically viable to do so and the wider planning benefits of 184 residential units, a purpose-built community facility, improved retail spaces and the capacity for an upgraded entrance to the underground station will not be brought forward.

44. The change in affordable housing provision will help address the economic challenges facing the site; the development will still exceed the requirements of planning policy and provide the maximum contribution towards affordable housing that can viably be offered. With reference to S106A(6) of Town and Country Planning Act 1990 (as amended), this modification will ensure that the obligation continues to serve a useful purpose equally as well as the original wording whilst supporting the viability of the development.
45. In the context of the wider planning benefits, this is an appropriate change in the context of continuing to support sustainable development for the Borough.

**Savills**  
**December 2020**