Appellant’s Statement of Case

100 Avenue Road, London, NW3 3HF

LPA Ref: 2021/0025/P

May 2021

Prepared by Savills (UK) Limited

on behalf of

Essential Living (Swiss Cottage) Limited

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1. Introduction

1.1. This Statement of Case ("SoC") has been prepared by Savills (UK) Limited on behalf of Essential Living (Swiss Cottage) Limited ('the Appellant').

1.2. The Appellant will seek to agree a separate Statement of Common Ground ("SOCG") with the London Borough of Camden as the Local Planning Authority ("the LPA"), in the lead up to the anticipated Public Inquiry.

1.3. The submission of this Appeal follows the refusal by the LPA of an application made under reference: 2021/0025/P and submitted on 4 January 2021 pursuant to S.106A of the Town and Country Planning Act 1990 for amendments to planning obligations within the existing S.106 deed dated 24 August 2015 relating to land at 100 Avenue Road, London, NW3 3HF.

1.4. The Description of Development, as set out on the LPA Decision Notice dated 23 March 2021, is:

> *Application in accordance with Section 106A, sub-sections (3) and (4), to amend clause 3.2 (and associated definitions) of S106 Agreement relating to 2014/1617/P dated 24/08/2015 (as amended by 2018/4239/P dated 04/08/2020 and 2019/1405/P dated 07/05/19) (for: redevelopment of site including a 24 storey and 7 storey building with a total of 184 residential units, 1,041sqm of retail/financial or professional services/café/restaurant and 1,350sqm of community use (summary)). The AMENDMENTS include REMOVING the requirement to provide 28 Affordable Rent units, 8 Intermediate Housing units and 18 Discounted Market Rent units (for a minimum of 15 years post completion), to be REPLACED with 18 Discounted Market Rent units in perpetuity. Modification of various relevant definitions - Disposal Viability Assessment, Original Viability Assessment and Surplus - to refer to Gross Development Value figure identified in the Financial Viability Assessment report dated 09/12/2020.*

1.5. The application was refused by the LPA on 23 March 2021 for the following sole reason:

> *1) In accordance with Section 106A of the Town and Country Planning Act the planning obligation shall continue to have effect without modification. The application to modify the affordable housing obligation is refused as the original obligation is considered to serve a useful purpose which is delivering the consented amount and tenures of affordable housing. Furthermore, the proposed modification would not serve it equally well, because there would be a significant reduction in the amount of affordable housing and a loss of a range of tenures that are considered genuinely affordable. Therefore, the proposed modification to the original planning obligation would fail to meet the requirements of s106A(6)(c) of the Town and Country Planning Act 1990.*

1.6. This SoC sets out the Appellant's case that the proposed development would meet the requirements of s106A(6)(c) of the Town and Country Planning Act 1990 and the revised development would continue to comply with the adopted policies of the Development Plan, and with the policies set out within the National Planning Policy Framework (NPPF).

1.7. This SoC is set out under the following headings:

- **Section 2** outlines the background to the Appeal including details of the relevant site, planning history and the reasons why such an application was made;

- **Section 3** outlines the procedural route for the application and Appeal;
- **Section 4** sets out the planning case for the proposals; and
- **Section 5** provides a summary of the Appellant's case.

1.8. A full assessment of the proposed amendment is provided within the Application documents. This includes both assessment of the planning procedural matters and the viability of the proposed revised approach that underpins the reasoning for the proposed revisions.

1.9. The Application documents should be reviewed in full, with this SoC providing a supplementary assessment that responds specifically to the LPA's reason for refusal.

1.10. A full list of documents for approval was noted within both the LPA officer's report and the subsequent Decision Notice. The Appellant agrees that this list notes all relevant documents that would be approved if this Appeal was allowed.

1.11. A draft Statement of Common Ground (SoCG) has been prepared by the Appellant who will seek to agree this as part of ongoing discussions and co-operation with the LPA.

1.12. A Deed of Variation to the existing S106 Agreement, setting out in full the required amendments to the existing legal agreement, has also been prepared and submitted with this Appeal.

2. Background Information

Site Description

2.1. The Appeal site faces directly onto Avenue Road. Designated as the A41, at this location Avenue Road is a dual carriageway road. It is key arterial route into central London from the north western suburbs and beyond and offers direct route from the North Circular Road and the M1 in the north through to the West End to the south. It sits to the east of the large junction/gyratory formed by the meeting of Finchley Road, College Crescent, Eton Avenue and Avenue Road itself. Eton Avenue runs along the northern boundary of the site.

2.2. The site is within the identified Finchley Road and Swiss Cottage Town Centre. Its location on a main vehicular route into central London from the north means that has prominence in the immediate local area.

2.3. To the rear of the site is the Swiss Cottage Open Space, a publicly accessible area of landscaped open space and the Hampstead Theatre. Swiss Cottage Library and Leisure Centre are immediately to the south.

2.4. The site is also immediately adjacent to an access to Swiss Cottage London Underground station on Avenue Road. Given this and the range of local bus services on the adjacent road network, the site enjoys the highest Public Transport Accessibility Level (PTAL) rating of 6b.

2.5. The site is not itself located within a conservation area but there are several in close proximity. These include Belsize Park, Fitzjohn Netherhall, South Hampstead and Elsworthy Conservation Areas. Swiss Cottage Library is also a Grade II listed building.

2.6. The immediate location is dominated by the road network. However, beyond the gyratory itself the area is predominantly residential in character.

2.7. Prior to its demolition, the site had accommodated a six storey office building dating from the 1980s. That building was demolished as part of the implementation of the planning permission to which this Appeal relates. Planning history is further discussed below.

2.8. The site has a total area of just over 6,000 sq m.

2.9. The site is formally allocated for development by the LPA as part of the Site Allocations DPD that was adopted in 2013. This required development to optimise the site's potential to provide new housing, include food, drink and/or other town centre uses, respect the Swiss Cottage Open Space, contribute to public realm improvements and contribute to pedestrian safety / junction / town centre improvements.

Relevant Previous Planning History

2.10. Planning permission was granted on 18 February 2016 (Ref: 2014/1617/P) by the Secretary of State following an Appeal (Ref: APP/X5210/W/14/3001616) for the following development at 100 Avenue Road:

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.

2.11. The planning permission was implemented in December 2017 through initial demolition on-site. This was confirmed by the LPA through the grant of a Certificate of Lawful Existing Use or Development (CLEUD) in February 2018 (Ref: 2017/6884/P).

2.12. Since then, following complete demolition of the previous buildings, on-site construction works have continued relating to the construction of the approved basement. At the time of writing, this is the point that construction has reached with substantive work on-site paused in the summer of 2020 due to a combination of rising costs, construction delays and the impact of the Covid-19 pandemic. The current situation is therefore a cleared site with a completed basement form now in situ including a ground floor slab above.

2.13. A more detailed timetable of events since the original planning application was submitted, is provided in the submitted Draft Statement of Common Ground (SoCG).

Non-Material Amendments

2.14. This implemented 2016 permission has subsequently been subject to two Non-Material Amendment (NMA) approvals, submitted and approved under S96a of the Town and Country Planning Act (as amended). Firstly, the wording of Condition 18 was amended (Ref: 2019/1405/P, granted 7th May 2019) and secondly some minor changes to internal layouts and external details were approved (Ref: 2018/4239/P, granted 4th August 2020).

S106 Agreement

2.15. The legal agreement associated with this planning permission, agreed in accordance with Section 106 of the Town and Country Planning Act 1990 (as amended), was completed on 24 August 2015 during the course of the Appeal process that led to planning permission being granted.

2.16. For the purposes of this Appeal, the principal relevant clause of the existing S106 Agreement is Clause 3.2 (and its associated definitions). The purpose of Clause 3.2 is to ensure that the development delivers the maximum reasonable amount of affordable housing consistent with both the requirements of the Development Plan and the delivery of a viable scheme. The inter-relationship between these two arms is fundamental: if a scheme cannot be delivered viably then it will not be able to deliver the maximum reasonable amount of affordable housing.

2.17. The proposed development was subjected to viability testing at the time of the original determination as was required by relevant Local Plan policies at that time, specifically CS6 and DP3, and also set out within London Plan (2011) Policy 3.12 at that time. In issuing the original approval in 2016, the Secretary of State confirmed that, in providing the maximum affordable housing provision possible having regard to the viability of the scheme, the approved development offered a level of affordable housing provision in accordance and complying with the polices of the Development Plan.

2.18. This position was also agreed by the LPA at the time that the application was originally determined and followed independent assessment by the LPA's appointed assessor in such matters. At that time, this reflected the requirements of adopted Local Plan Policies CS6 and DP3. Although these policies have now been superseded by the replacement Local Plan adopted in 2017, the same principles are maintained today through Local Plan Policy H4 and London Plan (2021) Policies H4 and H5.

2.19. This is therefore the context in which Clause 3.2 must be considered. In applying the statutory provision in this case, the 'purpose' of the obligation is to ensure that the development is accompanied by obligations which are necessary for it to be acceptable in principle; that relating to affordable housing is needed to ensure that the development conforms to affordable housing policy. Affordable housing policy required in 2015, and still requires, the maximum reasonable level of affordable housing to be provided consistent with the development remaining viable.

2.20. That is the relevant 'purpose' of the part of the s106 which the Appellant seeks to modify. S.106A is deliberately couched in terms of the purpose of the relevant obligation, and therefore a correct understanding of the purpose of the obligation is a necessary pre-requisite to operating the provision.

Background to the Appeal Submission

2.21. Essential Living are a long-term owner and operator of Build to Rent in London and the South-East. Their Modus Operandi is to develop purpose-built rental apartments and amenity spaces with a high level of customer service. The intention is to keep these apartments within their ownership long-term in order to gain a steady income stream for the institutional fund that supports them.

2.22. The locations of Essential Living buildings are strategically chosen in locations close to, or above, transport hubs, usually consisting of between 100 and 300 apartments.

2.23. 100 Avenue Road therefore meets Essential Living's strategic brief, and they remain committed to delivering the site once it becomes viable for them to do so.

2.24. Essential Living paused significant construction works on the site in the Summer of 2020, following the completion of the demolition, piling and basement box. Due to Covid-19, the cost of the main contract amongst other mounting costs, and significant delay to the original project timescales, inter alia, a decision was made to submit the S106A application in order to improve the current position on the scheme's viability.

3. Procedural Route

3.1. An application was made by the Appellant to the LPA on 4 January 2021 to amend the existing S.106 Agreement ref: 2014/1617/P dated 24 August 2015.

3.2. The application was made in accordance with Section 106A, subsections (3) and (4), of the Town and Country Planning Act 1990 (as amended) which state:

> *(3) A persons against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation-*
>
> > *(a) to have effect subject to such modifications as may be specified in the application; or*
> >
> > *(b) to be discharged.*
>
> *(4) In Subsection (3) "the relevant period" means-*
>
> > *(a) such period as may be prescribed; or*
> >
> > *(b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.*

3.3. More than 5 years have passed since the original S.106 Agreement was completed and the "relevant period" has accordingly expired. At the time of submission to the LPA therefore, it was permissible for the Appellant to seek an amendment of planning obligations in the original deed under the provisions of S106A.

3.4. The application for amendment was made on 4 January 2021 under ref: 2021/0025/P and refused by the LPA on 23 March 2021.

3.5. 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) of the Town and Country Planning Act 1990. This states:

> *(6) Where an application is made to an authority under subsection (3), the authority may determine—*
>
> > *(a) that the planning obligation shall continue to have effect without modification;*
> >
> > *(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or*
> >
> > *(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications*

3.6. The LPA has determined the application that was submitted to them. They have determined that, in their opinion, the proposed modification to the obligation will not serve the purpose of the (original) obligation as equally well as if it was unmodified.

3.7. As such, the proposal to modify the obligations in accordance with S.106A(6)(c) of the Town and Country Planning Act 1990 has been refused and the LPA has determined that the planning obligation should continue to take effect without modification in accordance with S.106A(6)(a) of the Town and Country Planning Act 1990.

3.8. Where an LPA has determined that, in their view, an existing S.106 obligation should not be modified then the applicant may appeal. Specifically, S106B of the Town and Country Planning Act 1990 states:

> **106B Appeals in relation to applications under section 106A**
>
> *(1) Where an authority (other than the Secretary of State)*
>
> *(a) fail to give notice as mentioned in section 106A(7); or*
>
> *(b) determine under section 106A that a planning obligation shall continue to have effect without modification,*
>
> *the applicant may appeal to the Secretary of State.*
>
> *(2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.*
>
> *(3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.*
>
> *(4) Subsections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section.*
>
> *(5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.*
>
> *(6) The determination of an appeal by the Secretary of State under this section shall be final.*
>
> *(7) Schedule 6 applies to appeals under this section.*
>
> *(8) In the application of Schedule 6 to an appeal under this section in a case where the authority mentioned in subsection (1) is the Mayor of London, references in that Schedule to the local planning authority are references to the Mayor of London.*

3.9. In this case:

- *An Application to modify an existing planning obligation was submitted under S.106A(3) and (4) of the Town and Country Planning Act 1990 on 4 January 2021.*
- *That Application was validated by the Local Planning Authority under ref: 2021/0025/P.*
- *Following consideration, the Local Planning Authority determined that, in their view, that obligation should not be modified and instead should continue to have effect in its original form in accordance with S.106A(6) of the Town and Country Planning Act 1990; and*
- *A decision notice to this effect was issued by the Local Planning Authority dated 23 March* 2021.

3.10. Given the above, procedurally the Appellant has a right of Appeal in accordance with S.106B(1)(b) of the Town and Country Planning Act 1990.

3.11. The substantive case for an Appeal is discussed further below.

4. Case for Modification of S106 Agreement

4.1. The formal reason for refusal makes clear that the LPA have adopted a position that, in their view, the modified planning obligation will not serve the purpose of the original planning obligation as equally well, as required by S.106A(6)(c) of the Town and Country Planning Act 1990. As such, the application for amendment was refused.

4.2. Following review of the officer delegated report, the Appellant's case is that the decision of the LPA to refuse the application, is procedurally flawed and without merit. In this case, an application in accordance with S.106A(6)(c) of the Town and Country Planning Act 1990 for the modification of the existing Clause 3.2 must consider both the viability of the development and the overall range of planning benefits that will continue to be delivered from the approved development if the modification to the S106 obligation is allowed because otherwise, the s.106 will not meet the same purpose; it will simply impose an affordable housing requirement which makes the development unviable.

4.3. The test for modifying a S.106 obligation provided for in S.106A(6)(c) of the Town and Country Planning Act 1990 is where the original planning obligation continues to serve a useful purpose, whether the modified planning obligation would serve that purpose equally well. The applicant's supporting materials explain why and how the application satisfies the S.106A(6)(c) test and the rationale for the necessary modification sought by the Appellant.

4.4. It is apparent from the delegated officer report, that the LPA is seeking to promote a flawed procedural point on the application, namely that the LPA is not required, as part of its consideration of the merits of the application, to have regard to matters relied upon in support and which go to the heart of the proposed modification (in this case a viability appraisal prepared by Savills), but is simply required to have regard to the S.106A(6)(c) test in isolation. That position is misconceived.

4.5. There is nothing either in the wording of S.106A(6)(c) or elsewhere to support an approach that wider circumstances (in this case, the viability position and submitted appraisal) cannot be taken into account. Indeed, if the LPA is correct there would be no scope for any decision maker at any stage of the application process to interrogate and satisfy itself on the underlying justification for an S.106A application to modify a planning obligation. This cannot be a correct or sound interpretation.

4.6. The Appellant is aware of a previous case where an Inspector determined an Appeal for a modification of an existing planning obligation relating to affordable housing contributions in accordance with S.106A(6)(c). Specifically, this related to a site known as Queens Hotel in Portsmouth (PINS Ref: APP/Z1775/Q/18/3203583, dated 18 March 2019) where the Inspector agreed that the previously agreed level of affordable housing could be modified appropriately through the modification of a planning obligation within the existing S106 Agreement.

4.7. This Appeal provides a clear example of where the Inspectorate has previously considered it appropriate to reassess affordable housing contributions in light of updated viability evidence and allow a change to a planning obligation in accordance with S.106A(6)(c) of the Town and Country Planning Act 1990 on the basis that the modified planning obligation would serve the specific purpose of delivering a contribution to affordable housing as equally well as the original obligation.

4.8. A copy of the relevant Appeal Decision is provided as an Appendix to this SoC.

4.9. As discussed in Section 2, 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 (the LPA's Local Plan Policy H4 today and Policies CS6 and DP3 at the time of the original determination) and the delivery of a viable scheme. The inter-relationship between these two arms is fundamental; if a scheme cannot be delivered viably then it will not be able to deliver the maximum reasonable amount of affordable housing.

4.10. The modification 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.

4.11. This modification 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.

4.12. The Appellant will address this matter further within the Appeal itself.

Viability Matters

4.13. Although the LPA's delegated officer's report is clear that the decision has been made upon a procedural basis, an assessment of the submitted materials and particularly the Viability Assessment was still undertaken. Indeed, the officer's report states that whilst a detailed assessment was undertaken it did not form part of their reason for refusal and stated it was undertaken on a "without prejudice" basis.

4.14. The Viability Assessment was subject to independent review by the LPA's independent assessor, BPS.

4.15. BPS largely agree with the appraisal assumptions adopted by Savills, with the significant areas of difference limited to the timing within the project cash flow of the income from the investment value of the proposed homes, and the approach to Site Value. In addition, BPS' analysis of the construction costs highlight references to value engineering opportunities which are within Gardiner and Theobald's cost assessment.

4.16. In spite of the differences, BPS conclude that the existing consent is not technically viable, even if measured against a Site Value of £1.

4.17. BPS conclude that the proposed changes to the scheme still leave a technical deficit of £111,933. We note that BPS' appraisal of the proposed modified scheme includes a profit of £15.03m. This compares to their assessment of the existing consent which includes to a negative profit of £2.79m and total deficit of -£15.56m. Clearly the proposed modification is substantially more deliverable based on BPS figures.

4.18. In respect of the differences in cashflow assessment, we note that the RICS build to rent valuation guidance ('Valuing Residential Property Purpose Built for Renting') states at para 5.4.5:

> *"The capitalisation rate will be informed by careful analysis of comparable transactions and applied to the net yield (net of purchaser's costs). Where appropriate, this will be adjusted to be on the special assumption of a stabilised state, if the comparable transaction occurred during the development or let up phase".*

4.19. We understand the comparable yields identified and the evidence included from market sources reflect assets with stabilised rents and as such our appraisal adopts a transaction based on a stabilised asset rather than a transaction reflecting a forward-commitment structure with income from the sale of the asset at Practical Completion.

4.20. BPS have also drawn attention to the potential for value engineering of the construction cost that might improve the scheme. These references are taken from Gardiner and Theobald's cost plan analysis and are largely limited to minor cosmetic finishes that will not materially affect the construction cost. Notwithstanding that BPS agree with the overall costs proposed and have not suggested any cost reduction, we note that the most significant cost items referring to value engineering opportunity appear to be in respect of the apartment balconies, for which the materials and specification are a consequence of the planning consent (including the associated discharge of details of external materials under Condition 18) and the relevant building regulations.

4.21. Aside from the financial matters they conclude, BPS have highlighted that the purpose of late stage viability reviews is not to enable the reduction of affordable housing contributions. A similar comment is made at paragraph 4.2 of the LPA's delegated report. The Appellant stresses that the application was not submitted as a late stage review of viability but an application to modify the current consent to enable delivery, as set out above.

4.22. Overall, the BPS report in effect agrees with the Appellant's conclusions that the scheme in its current form cannot be delivered but that the proposed changes lead to a substantial improvement that will make the scheme deliverable in allowing EL to justify proceeding with the development.

4.23. On this basis, there is a clear viability position to underpin the proposed amendment. The Appellant will present this case in more detail within the Appeal process.

4.24. The proposed amendment will support the ongoing delivery of the approved scheme and the full range of planning benefits that it will provide, namely:

- *184 new residential units in the context of recent under delivery of homes when measured against both the requirements of the housing delivery test and London Plan housing targets for the Borough;*
- *A building of high quality design that was supported by both the GLA and the Design Council through independent review;*
- *Provision of a new active frontage with flexibility to provide retail, café and restaurant facilities;*
- *A purpose-built community centre facility within the development envelope itself, designed to meet the requirements of an existing local community group as a significant upgrade upon their existing facilities;*
- *Communal external amenity spaces available to residents in addition to provision of private amenity spaces;*
- *In-built capacity for provision of a new entrance to the existing underground station if required operationally by London Underground, thereby enhancing sustainable transport facilities / modal split;*
- *19 residential units (10% of the development) to be fully wheelchair accessible;*
- *240 secure cycle spaces for residents and a further 48 spaces for use by visitors within the development's landscaped areas thereby enhancing sustainable transport facilities / modal split;*
- *An energy efficient development achieving a 30% reduction in carbon emissions relative to the targets of Part L of the 2013 Building Regulations;*
- *A new pedestrian access route from Avenue Road to the adjacent Swiss Cottage Open Space that will be directly overlooked by residents and the active retail frontages;*
- *New landscaping around the development and the Swiss Cottage Open Space including the provision of large replacement trees; and*

- *A reduction in the number of car parking spaces on-site compared to the previous building which reduces highways stress. On-site car parking of 13 spaces is provided for disabled use only with provision of electric vehicle charging points.*

4.25. This range of planning benefits is in addition to the substantial financial contributions that the development has already delivered since implementation, namely:

Financial Contribution	**Amount**
Public Realm	£231,813 plus indexation
Travel Plan Monitoring	£6,002 plus indexation
Public Open Space Maintenance	£25,000 plus indexation
Landscape Works	£232,800 plus indexation

4.26. The development has also contributed £5,264,355 in Community Infrastructure Levy payments to date. Although separate from the planning permission itself, a licence for access over the adjacent public open space during construction has constituted a further payment to the London Borough of Camden of £550,366 to date.

4.27. In this context, the relevant assessment is not to compare the 'planning balance' in 2014/2015 to 2021 but instead to consider whether the proposed amendment is an appropriate modification to the approved scheme and serves the original purpose of the obligation equally well. This is the test required by S.106A(6)(c) of the Town and Country Planning Act 1990 and specifically in this case this relates to the provision of the maximum viable amount of affordable housing to ensure that the approved development and the broader package of planning benefits can be delivered. The proposed modification will deliver this.

4.28. All other aspects of the approved development remain unchanged from the approved development and consequently the planning merits of the development are also unchanged.

5. Summary of Case

5.1. This SoC sets out the Appellant's main planning case in support of the proposed S.106 Amendment.

5.2. The submitted viability assessment has confirmed that the development will, following the proposed amendment to the S.106 Legal Agreement continue to provide for the maximum viable amount of affordable housing as required by the LPA's Policy H4 and as such the proposed development will continue to be in accordance with the Development Plan with regard to these matters.

5.3. In light of the updated viability information, in accordance with S.106A(6)(c) of the Town and Country Planning Act 1990 it is appropriate for the existing Clause 3.2 (and associated definitions) to be modified because the modified planning obligation would serve the same purpose as the original obligation (that is, to provide for the maximum viable amount of affordable housing whilst still ensuring delivery of the development equally as well.

5.4. As a result, the proposed modification will also ensure the continued delivery of a wider range of planning benefits from the approved development including:

- *184 new residential units in the context of recent under delivery of homes when measured against both the requirements of the housing delivery test and London Plan housing targets for the Borough;*
- *A building of high quality design that was supported by both the GLA and the Design Council through independent review;*
- *Provision of a new active frontage with flexibility to provide retail, café and restaurant facilities;*
- *A purpose-built community centre facility designed to meet the requirements of an existing local community group as a significant upgrade upon their existing facilities;*
- *Communal external amenity spaces available to residents in addition to provision of private amenity spaces;*
- *In-built capacity for provision of a new entrance to the existing underground station if required operationally by London Underground;*
- *19 residential units (10% of the development) to be fully wheelchair accessible;*
- *240 secure cycle spaces for residents and a further 48 spaces for use by visitors within the development's landscaped areas;*
- *An energy efficient development achieving a 30% reduction in carbon emissions relative to the targets of Part L of the 2013 Building Regulations;*
- *A new pedestrian access route from Avenue Road to the adjacent Swiss Cottage Open Space that will be directly overlooked by residents and the active retail frontages;*
- *New landscaping around the development and the Swiss Cottage Open Space including the provision of large replacement trees; and*
- *A reduction in the number of car parking spaces on-site compared to the previous building which reduces highways stress. On-site car parking of 13 spaces is provided for disabled use only with provision of electric vehicle charging points.*

5.5. These benefits are in addition to the financial contributions and CIL payments already made.

5.6. Respectfully, having considered the matters set out, the Appeal should be allowed.

Appendix

- Appeal Decision Ref: APP/Z1775/Q/18/3203583, dated 18 March 2019, Queens Hotel, Clarence Parade and 14-16 Osborne Road, Southsea, Portsmouth, PO5 3LJ

The Planning Inspectorate

Appeal Decision

Hearing Held on 29 November 2018

Site visit made on 29 November 2018

by Andrew Dawe BSc(Hons) MSc MPhil MRTPI

an Inspector appointed by the Secretary of State

Decision date: 18 March 2019

Appeal Ref: APP/Z1775/Q/18/3203583
Queens Hotel, Clarence Parade and 14-16 Osborne Road, Southsea, Portsmouth PO5 3LJ

- The appeal is made under Section 106B of the Town and Country Planning Act 1990 against a failure to determine that a planning obligation should be modified.
- The appeal is made by Queen's Hotel (Portsmouth) Limited (formerly known as Manning Hotels Limited) against Portsmouth City Council.
- The developments to which the planning obligation relates are (1) construction of 7-storey building comprising health centre/retail unit at ground floor with 30 flats at 1st to 6th floor levels and associated cycle/refuse stores (after demolition of nos 12-16 Osborne Road); conversion of 2nd, 3rd and 4th floors of the hotel to form 30 flats; construction of podium and two conservatories with undercroft parking to south elevation; and (2) construction of eight-storey building comprising 38 apartments above extended landscaped podium level and associated car parking facilities.
- The planning obligation, dated 16 January 2012, was made between Portsmouth City Council and Manning Hotels Limited and National Westminster Bank PLC.
- The application Ref 16/02047/PAMOD is dated 14 November 2016.
- The application sought to have the planning obligation modified as follows: removal of the requirement for affordable housing on viability grounds.

Decision

1. The appeal is allowed. The planning obligation, dated 16 January 2012, made between Portsmouth City Council and Manning Hotels Limited and National Westminster Bank PLC, shall have effect subject to the modifications as set out in the draft deed of variation facilitating option 2, submitted on 13 December 2018, and subject to any agreed amendments between the parties relating to any typographical corrections or other amendments to make the deed reasonably and properly comprehensible.

Procedural Matters

2. The planning obligation referred to in the above header relates to a Deed of Variation (DoV) of a section 106 Agreement dated 21 April 2010 which itself relates to the first of the two developments, both of which were granted planning permission, described in bullet point three of the header. The DoV takes account of the addition of the second of those proposed developments.

3. The sixth bullet point in the above header relates to the appellant's position (option 1) set out in the original application for modification of the planning obligation. However, since then, and as presented in the appeal, the appellant has put forward an alternative position (option 2). That would entail the two planning permissions referred to above (P1 and P2 respectively) being

segregated and capable of independent implementation, with a commuted payment of £332,043 made to the Council to provide affordable housing within the city in association with P2. I have determined the appeal taking account of both options as the Council has had the opportunity to properly consider option 2 and so would not be prejudiced by its consideration.

4. The appellant referred to in the second bullet point of the above header relates to a change in name since the original application, which is not disputed by the Council.

Main Issue

5. The main issue is whether the planning obligation relating to affordable housing should continue to have effect without modification, whether it serves a useful purpose, or whether it serves a useful purpose that would be equally well served if it was modified as proposed.

Reasons

Main issue

6. The appellant claims that the current provision for 30 on-site affordable housing units would be unviable and prevent the beneficial development of the site to come forward. The appellant has put forward both the preferred and alternative options (options 1 and 2 respectively) to enable all or part of the beneficial development to come forward.

7. Firstly, based on the submitted evidence and Hearing submissions, option 2 would not necessarily prevent the whole of the combined development relating to both P1 and P2 to come forward, albeit with changed provision for affordable housing and notwithstanding whether or not it could be guaranteed in terms of financial viability. In this respect, I have also had regard to the findings of the District Valuers Service (DVS) which sets out that the level of affordable housing contribution referred to above for option 2 would be viable in respect of the implementation of P2 on its own. The DVS also found that P1 on its own would be financially unviable on an all private housing basis. Further viability assessments have been undertaken by both the Council and appellant since that of the DVS, which I have also taken into consideration.

8. It therefore remains to consider whether, based on all the submitted evidence, the appellant's options would be necessary to ensure the viability of the developments concerned. There is also the consideration as to whether the appellant's preferred option 1 would be acceptable in light of providing for no affordable housing, balanced against any risk of less than the total amount of development relating to P1 and P2 coming forward under option 2.

9. Sales values is a key issue and the main point of dispute between the Council and appellant, including whether this has changed the situation since the DVS report was conducted. The development would be in a sea facing location with an open aspect across the intervening common, which would have the potential to add value. However, a significant number of the proposed new units would not directly face the common and sea. Furthermore, the surrounding area comprises of a variety of different properties including a range of dwelling types, and non-residential uses along Osborne Road. As such, whilst the Council has submitted some evidence relating to sales prices for other local

residential properties few, if any, are sufficiently comparable in respect of type and location. Furthermore, the number of examples provided is also limited.

10. The close proximity of the proposed flats to local shops, bars, restaurants, facilities and services is a factor that would also have the potential to add value. However, the extent to which that would be the case is unclear from the evidence. Furthermore, the location close to potentially noisy bars and restaurants or above a hotel would have the potential to be a detracting factor, albeit acknowledging that there will be others who would be buying into the sea side scene.

11. There is therefore no certainty of significantly higher sales values than those accounted for by the DVS and I have received insufficient substantive evidence to demonstrate to the contrary. As such, there is insufficient substantive evidence to contradict the findings of the DVS and to demonstrate that the current situation relating to P1 and P2 and associated planning obligation would be viable; that option 1 would be viable with an affordable housing contribution; or that option 2 would be viable with any greater a financial contribution than that referred to above. I have also received insufficient substantive evidence to demonstrate how on-site affordable housing, instead of a financial contribution, could be viably and practically achieved in these circumstances.

12. With option 2 there would remain uncertainty as to the extent to which P1 would be implemented in terms of the benefits of providing the maximum amount of housing on the site as a whole. Nevertheless, based on the evidence provided, option 2 would secure the potential for viable development of the site, with certainty in respect of P2, including provision for some affordable housing, albeit off-site. Furthermore, it would not prohibit the development of P1, notwithstanding that that scheme has been found to be unviable on an all private basis, particularly with the two being unencumbered by each other. In that context, I consider that the appellant's preferred option 1, in failing to make any provision for needed affordable housing, would represent an unacceptable solution.

13. For the above reasons, it would be appropriate and acceptable for the planning obligation relating to affordable housing to be modified under the terms of the appellant's option 2.

Other matter

14. The Council has included in the submitted draft deed of variation, a requirement for the appellant to pay for the Council's reasonable and proper legal costs together with all disbursements incurred in connection with the preparation, completion and registration of the deed. It is disputed by the parties as to whether such provision should be included. However, this is a matter between the parties that is not a relevant consideration in my determination of this appeal.

Conclusion

15. For the above reasons, the appeal is allowed under the terms set out in the decision at paragraph 1.

Andrew Dawe

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Robin Henderson	Savills - Planning Consultant
Farid Yeganeh	Queens Hotel
Andy Leahy	Bespoke Property Consultants
Poppy Hood	Savills
Kevin Marsh	Savills
Paul Stewart	Queens Hotel

FOR THE LOCAL PLANNING AUTHORITY:

Simon Turner	Planning Officer
Richard Dixon	Dixon Searle Partnership

INTERESTED PERSONS:

Cllr Hugh Mason	Chair of Planning Committee