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Item No.	Classification:	Date:	Meeting Name:
4.1	OPEN	24 April 2023	Planning Committee
Report title:	<p>Development Management planning application: Application 22/AP/0485 for: Variation of Legal Agreement</p> <p>Address: 87 Newington Causeway London Southwark SE1 6BD</p> <p>Proposal: Variation of the Section 106 Agreement relating to planning permission 16/AP/3144 [dated 29.01.2018] for: "Redevelopment of the site for a mixed use development comprising a basement/mezzanine basement, ground plus twenty-three floors to accommodate a 140 room hotel (levels 1-11), 48 residential units (levels 12-24), a retail unit (at ground floor), associated cycle parking, servicing and refuse and recycling, landscaping and private and communal residential amenity space (including at roof top level), external refurbishment to the front of the railway arches, and a new pedestrian route through the site linking Newington Causeway with Tiverton Street".</p> <p>The variation would secure a financial payment in lieu of the delivery of the 16 affordable housing units on site.</p>		
Ward(s) or groups affected:	Chaucer		
From:	Director of Planning and Growth		
Application Start Date	18 February	PPA Expiry Date	
2022			
Earliest Decision Date			

RECOMMENDATION

1. That the variation of the Section 106 agreement be agreed.

EXECUTIVE SUMMARY

2. The developer has completed the development, which was approved by the planning committee in 2017. The legal agreement required them to provide 16 affordable homes on site, eight social rent and eight intermediate. The developer has not been able to find a Registered Provider (RP) to purchase these affordable homes so is proposing a financial payment of £5.95m in lieu of the delivery of these affordable homes on site.
3. Policy requires that there be no financial incentive for developers to provide a financial payment for affordable housing. This application has been subject to financial viability assessments, both from the applicant's and the council's consultants. Both show that, on current market conditions, the additional value

for the 16 homes in changing the tenure from affordable to market homes would be lower than the figure proposed by the applicant. The amount of the affordable housing contribution of £5.95m is consistent with P1 of the New Southwark Plan which requires that there should be no financial benefit to the applicant.

BACKGROUND INFORMATION

4. The s106 agreement of the original planning permission, reference 16/AP/3144, was signed in January 2018 and secured the construction of 16 affordable homes of which eight were to be social rent and eight intermediate, equalling 56 habitable rooms.
5. The applicant sought interest from 25 RPs and the council to purchase these homes but all have declined.

Details of proposal

6. It is proposed to replace the 16 on-site affordable homes in the approved scheme with a payment in lieu of affordable housing and to vary the obligations in the legal agreement regarding the affordable housing on site to a financial payment of £5.95m. This would be used for the delivery of affordable housing by the council in the borough. The specific clauses that would be amended are:

Schedule 2- Affordable Housing

Schedule 3- Viability

Schedule 4- Shared Ownership Units

Schedule 5- Shared Ownership and Remaining Wheelchair Housing Units

Schedule 6- Financial Contributions

7. The addition of a new definition of Off-site Affordable Housing Contribution as follows:
“Means the sum of to be paid by the Developer in accordance with 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...”. The indexation would apply from the date the deed of variation is signed.

Planning history of the site

8. The planning history is in appendix 1.

KEY ISSUES FOR CONSIDERATION

Summary of main issues

9. In determining this application, there are two main issues to consider. These are whether the submitted details are:

(a) acceptable in terms of policy, and

(b) Sufficient to amend the terms of the legal obligation and the reason for the imposition of the obligation.

10. These matters are discussed in detail in the 'Assessment' section of this report.
11. The detailed planning policy relating to this development is set out in the report on the original planning application. Any specific policy considerations relating to the submitted details are set out below.
12. Community impact, equalities and human rights implications are relevant considerations, as is working proactively and positively with applicants and agents. These matters are discussed in the 'Assessment' section of this report.

ASSESSMENT

Assessment of the proposed changes

13. The original purpose of the relevant parts of the Section 106 Agreement subject to this application for a variation was to secure affordable housing on site.
14. The draft Affordable Housing Supplementary Planning Document 2011 sets out the sequential test approach. This is followed to make sure that the council secures as much affordable housing as possible. The sequential approach is as follows:
 1. All housing, including affordable housing should be located on the development site.
 2. In exceptional circumstances we may allow the affordable housing to be provided off-site. In these circumstances we require that affordable housing is provided on another site or sites in the local area of the proposed development.
 3. In exceptional circumstances we may allow a pooled contribution in lieu of on-site or off- site affordable housing. In these circumstances we require a payment towards providing affordable housing instead of the affordable housing being built as part of the proposed development.'
15. Planning permission 16/AP/3144 secured affordable housing on the development site in keeping with point 1 of the sequential approach and the applicant has built it on site. The applicant does not have any other sites within the borough to provide the affordable housing on another site in accordance with point 2 above.
16. Point 3 of the sequential approach and Policy P1 of the Southwark Plan also allows payment in lieu in exceptional circumstances. The applicant was not able 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. The reasons given include:
 - Number of dwellings being too small for RPs

- A reduced appetite for s106 purchases
 - The location not being a priority for RPs
 - The height at 24 storeys being against RP strategies
 - Income caps on the shared ownership
 - Service charges
17. The development is not typical of the majority of s106 affordable housing schemes in that the housing is located above a hotel use. As the applicant points out this creates challenges in terms of the location of the affordable element at the top of the building and this also has an impact on service charges. The majority of s106 housing offers tend to be in development that are predominantly or exclusively residential with the affordable element usually on the lower floors. P1 of the Southwark Plan 2022 says that where development cannot provide social rented or intermediate housing on site there should be no financial benefit to the applicant. A financial appraisal was provided by the applicant's consultant, Savills dated June 2022. This appraisal was based on actual construction costs for the development and looked at the additional value that would be provided through the housing being delivered as 100% market housing. At that time this would have delivered a surplus of £6.1m for the payment in lieu. This assessment also included the cost of re paying the CIL relief claimed of £392k.
 18. The applicant's viability appraisal was reviewed by the council's consultant, Avison Young who concluded that surplus of £7.16m would be the result but this was without re-payment of CIL for the relief claimed by the applicant. The main difference in their assessment was the valuations for the three bedroom dwellings which AY initially considered to be higher in the market.
 19. Following the submission of the Avison Young report, the applicant identified that that the CIL relief that was legitimately claimed on the 16 affordable homes would need to be paid back which would add £545k to the costs, higher than that initially identified. There was also further discussion of the values for the dwellings in the current market, in particular the three bedroom dwellings.
 20. A further financial review was undertaken by Savills in March 2023 which took into account the repayment of the CIL relief but also the market adjustment in September 2022 following the national budget which significantly affected the housing market. Their revised assessment concluded that the surplus would be £5.79m instead of the £6.1 initially suggested, reduced mostly because of the market changes and the higher CIL payment that would be due.
 21. Avison Young reviewed this latest assessment and identified that the legal agreement allowed for a higher income threshold for the shared ownership affordable of up to £90k. Using the input Savills suggested with the higher value for the shared ownership, Avison Young's assessment is that the surplus would be £5.386m. The inputs Avison Young have used generates a surplus of £5.560m. Both outcomes are below the offer from the applicant of £5.95m which the applicant has maintained and officers recommend that this offer is accepted.
 22. A similar application for a development to provide a financial contribution instead of on-site delivery was approved by members of planning sub-committee A in January 2023 (application reference 21/AP/4229). The site is on Gilkes Crescent where four affordable homes were secured in the legal agreement consisting of

16 habitable rooms. The payment in that case, using the same methodology was £1,991,470 which is £124k per habitable room, compared to £101k for this application (based on 59 habitable rooms which is what 35% of the total would be). An off site in lieu payment was also agreed by planning committee in early 2022 at Rotherhithe Old Road under a different methodology (that predated the adoption of the 2022 Southwark Plan) that secured a payment of approximately £80k per habitable room. However the circumstances of each case in terms of the mix and disposition of uses on each site, the height of buildings and the relative values of the units all need to be considered on their own merits. In this instance and as set out above the Councils own independent advice is that the applicant is offering a payment that is above the surplus that we estimate would be generated by converting the affordable homes to private sale.

23. The Elim Estate proposal is an example of how this financial payment might be utilised in reviving stalled developments within the council's new homes programme. This development would provide 32 new homes in Chaucer Ward, all for social rent, delivered for the council by the Leathermarket JMB.



24. It is likely that finding would be allocated on eligible sites on a cascaded basis:
- First priority- Chaucer Ward
 - Second Priority- Elephant and Castle Opportunity Area
 - Third priority- Southwark

Consultations

25. Details of consultation and any re-consultation undertaken in respect of this application are set out in the appendix 2.

Summary of consultation responses

26. None.

Community impact and equalities assessment

27. The council must not act in a way which is incompatible with rights contained within the European Convention of Human Rights
28. The council has given due regard to the above needs and rights where relevant or engaged throughout the course of determining this application.
29. The Public Sector Equality Duty (PSED) contained in Section 149 (1) of the Equality Act 2010 imposes a duty on public authorities to have, in the exercise of their functions, due regard to three "needs" which are central to the aims of the Act:
 1. The need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act
 2. The need to advance equality of opportunity between persons sharing a relevant protected characteristic and persons who do not share it. This involves having due regard to the need to:
 - Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
 - Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
 - Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low
 3. The need to foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to tackle prejudice and promote understanding.
30. The protected characteristics are: race, age, gender reassignment, pregnancy and maternity, disability, sexual orientation, religion or belief, sex, marriage and civil partnership. The lack of provision of affordable housing has a disproportionate impact on individuals from BAME backgrounds. Whilst council policy prioritises on site provision, in circumstances such as these where it has no proved possible to achieve that, the provision of the maximum viable in lieu payments is acceptable. The payment will help to fund the delivery Councils own housing programme.
31. The legal agreement would be varied by adding clauses to require the applicant to provide a financial payment instead of affordable housing on site. This would comply with the Section 106 Planning Obligations and Community Infrastructure Levy (CIL) Supplementary Planning Document. Lack of access to affordable housing disproportionately affects people from ethnic minorities communities and the money would be used to provide council homes in the borough. At present whilst the units have been built the lack of an RP willing to purchase the units means that they make no contribution to the need for affordable housing in te borough. The in lieu payment would offer a means for the council to deliver its own council housing programme as set out earlier in this report.

Human rights implications

32. This planning application engages certain human rights under the Human Rights Act 2008 (the HRA). The HRA prohibits unlawful interference by public bodies with conventions rights. The term 'engage' simply means that human rights may be affected or relevant.
33. This application has the legitimate aim of extending and refurbishing an existing office building. The rights potentially engaged by this application, including the right to a fair trial and the right to respect for private and family life are not considered to be unlawfully interfered with by this proposal.

Positive and proactive statement

34. The council has published its development plan and Core Strategy on its website together with advice about how applications are considered and the information that needs to be submitted to ensure timely consideration of an application. Applicants are advised that planning law requires applications to be determined in accordance with the development plan unless material considerations indicate otherwise.
35. The council provides a pre-application advice service that is available to all applicants in order to assist applicants in formulating proposals that are in accordance with the development plan and core strategy and submissions that are in accordance with the application requirements.

Positive and proactive engagement: summary table

Was the pre-application service used for this application?	NO
If the pre-application service was used for this application, was the advice given followed?	N/A
Was the application validated promptly?	YES
If necessary/appropriate, did the case officer seek amendments to the scheme to improve its prospects of achieving approval?	N/A
To help secure a timely decision, did the case officer submit their recommendation in advance of the agreed Planning Performance Agreement date?	YES

CONCLUSION

Given the particular circumstances of this site, with a mix of hotel and housing uses in a tall building, and the difficulty of securing a Housing Association to take on the affordable homes, an in lieu payment is considered the most appropriate way of securing affordable housing delivery. In particular the delivery of the councils house building programme within the Chaucer ward.

BACKGROUND INFORMATION

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Application file 22/AP/0485 Southwark Local Development Framework and Development Plan Documents	Environment Neighbourhoods and Growth Department 160 Tooley Street London SE1 2QH	Planning enquiries telephone: 020 7525 5403 Planning enquiries email: planning.enquiries@southwark.gov.uk Case officer telephone: 0207 525 1778 Council website: www.southwark.gov.uk

APPENDICES

No.	Title
Appendix 1	Planning history of the site
Appendix 2	Consultation undertaken – Press Notice 10 March 2022

AUDIT TRAIL

Lead Officer	Stephen Platts, Director of Planning and Growth	
Report Author	Dipesh Patel,	
Version	Final	
Dated	14 April 2023	
Key Decision	No	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments included
Strategic Director of Finance and Governance	No	No
Strategic Director of Environment and Leisure	No	No
Strategic Director of Housing and Modernisation	No	No
Director of Regeneration	No	No
Date final report sent to Constitutional Team	14 April 2023	

Appendix 1: Relevant planning history of the site

Reference and Proposal	Status
<p>16/AP/3144 Redevelopment of the site for a mixed use development comprising a basement/mezzanine basement, ground plus twenty-three floors to accommodate a 140 room hotel (levels 1-11), 48 residential units (levels 12-24), a retail unit (at ground floor), associated cycle parking, servicing and refuse and recycling, landscaping and private and communal residential amenity space (including at roof top level), external refurbishment to the front of the railway arches, and a new pedestrian route through the site linking Newington Causeway with Tiverton Street</p>	<p>Granted with Legal Agreement 29/01/2018</p>

Appendix 2: Consultation undertaken

Site notice date:

Press notice date: 10/03/2022

Case officer site visit date: n/a

Neighbour consultation letters sent:

Internal services consulted

Statutory and non-statutory organisations

Neighbour and local groups consulted:

Re-consultation: