

Committee: Strategic	Date: 8 th October 2015	Classification: Unrestricted	Agenda Item Number:
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Report of: Director of Development and Renewal	Title: Variation to the Legal Agreement under S106A
Case Officer: Jermaine Thomas	Ref No: PA/15/02668 - Vary Section 106
	Ward: Blackwall and Cubitt Town

1. APPLICATION DETAILS

Location:	2 Trafalgar Way, London
Existing Use:	Vacant Site
Proposal:	Application for Deed of Variation to section 106 agreement dated 10 Nov 2009 ref PA/08/01321 (as amended by a Deed of Modification dated 9 th December 2014), ref: PA/14/01771
Drawing and documents:	Essential Living Letter dated 16 th September 2015: Application to Modify the Section 106 Agreement dated 10 November 2009 as amended by the Deed of Modification dated 9 th December 2014
Applicant:	Essential Living
Ownership:	Applicant
Historic Building:	None
Conservation Area:	None

2. EXECUTIVE SUMMARY

- 2.1. The proposal in essence removes the requirement for delivery of affordable housing on site in return for a substantially increased payment for offsite affordable housing

- 2.2. The Local Planning Authority has considered the particular circumstances of this application against the Development Plan and other material considerations (including the NPPF) and has concluded that:
- The proposed increase in the affordable housing contribution would maximise opportunity for the Council to deliver its own affordable housing programme.
- 2.3. The proposed modifications to the section 106 agreement and resulting affordable housing provision would comply with the development plan policies and NPPF.
- 2.4. The contributions have been secured and negotiated in line with the S106 Supplementary Planning Document and officers consider that the package of contributions being secured is appropriate, relevant to the development being considered and in accordance with the relevant statutory tests.

3. RECOMMENDATION

- 3.1. That the Committee resolve to APPROVE a modification under s106A of the 1990 Planning Act of the 2009 Agreement (as modified by the 2014 Agreement) subject to:
- 3.2. Any direction by The Mayor.
- 3.3. The prior completion of a second deed of modification to secure the following planning obligations:

Financial Obligations:

- a) A contribution of £17,074,949 towards off site affordable housing
- b) A contribution of £749,685 towards Education
- c) A contribution of £647,633 towards Public Open Space
- d) A contribution of £1,852,624 towards Public Realm
- e) A contribution of £126 towards Traffic Order
- f) A contribution of £29,628 towards Public Art
- g) A contribution of £645,355 towards Health

Non-financial contributions

- a) Car free agreement
- b) Employment / training initiatives
- c) Public Art opportunity
- d) TV/ Radio reception monitoring and impact mitigation
- e) Travel Assessment
- f) Any other planning obligation(s) considered necessary by the Corporate Director Development & Renewal

- 3.4. That the Corporate Director Development & Renewal is delegated power to negotiate the second deed of modification referred to at 3.3 above within normal delegated authority.

4. PROPOSAL, SITE CONSIDERATIONS and BACKGROUND

Proposal

- 4.1. The applicant is seeking to modify the section 106 agreement under Section 106A of the Planning Act 1990.
- 4.2. The proposed modifications to the legal agreement include changes to and deletion of definitions, contributions and schedules to secure the following:
- Removal of 66 on-site affordable housing units (57 Intermediate Units / 9 Social Rented)
 - Increase in the affordable housing contribution to £17,074,949 (previously £12,857,000. This will enable the provision of a 24.8% Off Site Affordable Housing scheme calculated by habitable room
- 4.3. The following comparative table provide context for the proposed modifications (right column) in relation to the existing secured planning obligations.

		Approved 2009 Consent	Approved 2014 Consent	Approved 2014 Consent (Inclusive of RPI)*	Proposed 25% Off Site Offer
On-Site Affordable Housing	Intermediate	60	57**	57**	0
	Social	9	9	9	0
	Total	69	66	66	0
Off Site Affordable Housing Contribution		£12,857,000	£12,857,000	£15,236,831*	£17,074,949
Other S106 Contributions		£3,312,000	£3,312,000	£3,925,051*	£3,925,051
Total Contributions		£16,169,000	£16,169,000	£19,161,882*	£21,000,000
Affordable Housing Provision Overall		35%	35%	35%	24.8%

Site and Surroundings

- 4.4. The island site has a total area of 0.4 hectares and is located to the south of Aspen Way and to the North of Poplar Dock. The site slopes down gently towards the east. The site was previously occupied by a McDonald's restaurant and drive-thru takeaway facility. The McDonalds building has

been demolished and the site has been cleared for development. The application site is currently enclosed with closed boarding. The site does not fall within a conservation area and does not comprise of any listed buildings.

Relevant Planning History

Application Site

- 4.5. **Approved Development - PA/08/01321** – The LPA granted full planning permission on the 10 November 2009 for the:

“Redevelopment of the site to provide a residential-led mixed use scheme including two towers of 29 storey and 35 storeys and comprising 414 residential units, re-provision of drive-through restaurant, retail / financial and professional service units, crèche, gymnasium, associated residential and community amenity space and car parking.”

There have been two non-material amendment applications which are listed below:

- 4.6. **PA/11/03346** – The LPA granted a non-material amendment on the 19 December 2011 for the following:

- Revision to the lifting strategy in Building A to provide revised access for the lower and upper levels of this block.
- Revised ground floor access to podium level
- Associated amendments to ground floor plan to show removal of redundant serviced apartments entrance
- Reconfiguration of 2 residential units on floors 3 to 26 and two duplex units on floors 27/28 to accommodate lifting strategy
- Enclosure of inset balconies with open-able glazed doors/rainscreens to create winter style gardens
- Reorientation of balconies to face south west rather than south

- 4.7. **PA/13/02453** – The LPA granted a non-material amendment on the 12 November 2013 for the following:

“Insert a new condition (compliance with plans)”

- 4.8. **PA/14/0062** - Application for non-material amendment following grant of planning permission on 10/11/2009, ref: PA/08/01321. The amendments including changing the triggers to various conditions as set out in the attached schedule.

Approved 10/10/2014

- 4.9. **PA/14/01771**

Application for minor-material amendment of planning permission PA/08/01321 dated 10/11/2009 (and as amended by NMA applications PA/11/03346 dated 19/12/2011, PA/13/02453 dated 12/11/2013 and PA/14/00062 dated 01/10/2014). The amendments consist of an increase in

the height of building A (by 3.9m) and building B (by 5.1m), removal of building C, alterations to the housing mix and layouts, reduction in the number of residential units from 414 to 395, alterations to the facades of the buildings, and increase in the size of the basement.

Approved 09/12/2014

4.10. **PA/15/00748**

Application to modify a Section 106 Agreement - Affordable Housing Contribution. The modification proposed the following:

- Amendment to 'Financial Contribution' definition to reduce the contribution (inclusive of the off-site affordable contribution) from £16,169,000 to £5,302,000.
- Amendment to the 'Off site Affordable Housing Contribution' definition to reduce the off-site housing contribution from £12,857,000 to £1,990,000)
- Amendment to 'On site affordable housing units' definition to include reference to Housing Tenure and Mix table at Schedule Two Part Two.
- Amendment to Off-site affordable housing contribution of £12,857,000 to £1,990,000 in Schedule 2 Part 2.

Refused 14/04/2015

4.11. **APP/E5900/S/15/3087250**

Appeal against refused S106b application PA/15/00748

Application to modify a Section 106 Agreement - Affordable Housing Contribution. This is currently the subject of an ongoing appeal. The hearing was original due to go ahead on 7th October but has been adjourned until November to allow this application to be considered. If this application is approved the Applicant has confirmed that the appeal will be withdrawn.

Background

4.12. The site has two implementable planning consents from 2009 (Ref: PA/08/01321) and 2014 (Minor Material Amendment) (Ref: PA/14/01771).

4.13. The 2014 consent reduced the approved number of residential units on site from 414 to 395.

4.14. The two planning consents are subject to Section 106 agreements which secured the following with regards to housing:

	<i>2009 Consent</i>	<i>2014 Consent</i>
<i>Total Number of Residential Units</i>	414	395
<i>Number of Intermediate Housing on site</i>	60	57
<i>Number of Social Rented Housing</i>	9	9
Total Number of Affordable Units	69	66
Off-site Affordable Contribution	12,857,000.00	£12,857,000.00

- 4.15. The 2009 and 2014 consents with a mixture of on-site affordable units and off-site affordable housing contributions each secured 35% affordable housing schemes.
- 4.16. The LPA considered it appropriate to approve the 2014 consent to allow Essential Living to redesign the floor layouts and deliver residential units that would accord with their own PRS internal design standards and requirements.
- 4.17. The number of on-site affordable housing units was reduced from 69 to 66 on a pro-rata basis to reflect the reduction in the number of units overall. The off-site housing contribution of £12,857,000 remained unchanged.
- 4.18. BNP Paribas, acting as the Council's Viability Consultants have since given their view that this 2014 consent is unviable if implemented with the current affordable housing requirements.
- 4.19. In March 2015 Essential Living submitted an application to change the affordable housing requirements on the 2014 Scheme, reducing the off-site contribution to £1,990,000 and removing the requirement for on-site provision of 66 affordable units. This application was submitted under s106B of the Planning Act 1990 that allows affordable housing provisions to be renegotiated where economic circumstances have changed so that the development is no longer economically viable.
- 4.20. The application was refused on 14th April. BNP Paribas acting as the Council's Viability Consultants supported the refusal of the s106B application, but advised that some reduction in the affordable housing provision would be reasonable. They further advised that a reduction in the off-site affordable housing contribution from £12,857,000 to £8,424,130.00 would be appropriate.
- 4.21. Essential Living submitted an appeal against the refused S106B application which will be determined at a Public Hearing scheduled for November 2015.
- 4.22. As part of the process of preparing for the hearing, Essential Living and the LPA explored ways in which the Council's need to secure a good level of affordable housing could be satisfied without compromising the viability of the development.
- 4.23. One option discussed, which is the subject of this application, was an application under section 106A of the Planning Act. Unlike section 106B, this does not focus on affordable housing alone but allows for a general variation of a previous 106 agreement.
- 4.24. Essential Living proposed that instead of retaining the obligation to provide the affordable housing on site, and reduce the off-site contribution, they would instead remove the on-site requirement and increase the off-site contribution.

- 4.25. The current policy requirement for affordable housing is 50%. Essential Living has offered a total of £21,000,000 in planning obligations, including £17,074,949 for off-site affordable housing but with the requirement for on-site provision removed. The revised financial contribution would enable provision of off-site affordable housing equivalent to 24.799% of the development as a whole.
- 4.26. The key issues for consideration are:
- The acceptability of the principle of off-site provision and the removal of the 66 on-site affordable residential units
 - The decrease in overall provision compared with what planning policies seek to provide.

5. POLICY FRAMEWORK

5.1. Section 38(6) of the Planning and Compulsory Purchase Act (2004) requires that planning applications are to be determined in accordance with the plan unless material considerations indicate otherwise.

5.2. For details of the status of relevant policies see the front sheet for “Planning Applications for Determination” agenda items. For a complex application such as this one, the list below is not an exhaustive list of policies, it contains some of the most relevant policies to the application:

5.3. Government Planning Policy Guidance

National Planning Policy Framework (2012) (NPPF)
National Planning Policy Guidance (2013) (NPPG)

5.4. London Plan 2015

- 3.10 Definition of affordable housing
- 3.11 Affordable housing targets
- 3.12 Negotiating affordable housing on individual and mixed use schemes
- 3.13 Affordable housing thresholds

5.5. Tower Hamlets Core Strategy (adopted September 2010) (CS)

SP02 Urban living for everyone
SP13 Planning Obligations

5.6. Managing Development Document (adopted April 2013) (MDD)

DM3 Delivery Homes

5.7. Supplementary Planning Documents include

Planning Obligations SPD (January 2012)
Draft Planning Obligations SPD (March 2015)
CIL Charging Schedule (April 2015)

5.8. **Tower Hamlets Community Plan**

6. CONSULTATION RESPONSE

- 6.1. The views of the Directorate of Development & Renewal are expressed in the MATERIAL PLANNING CONSIDERATIONS section below.
- 6.2. The following were consulted regarding the application:

Internal Responses

LBTH Housing

- 6.3. The applicant has applied for a change to the affordable housing provision on the consented scheme on the grounds that it is no longer viable. Our viability consultants disagree with a number of points made in their viability assessment and the applicant's intention is to submit their arguments to a planning inspector via the appeal mechanism.
- 6.4. Notwithstanding, the applicant has made a new offer of a financial contribution in lieu of affordable housing. The offer represents a position which is considerably below our policy requirement of 35% on site or 50% offsite, but it is accepted that financial viability is a major factor which will guide the level of contribution that a development can sustain. The council through its planning committee must decide whether a firm financial offer which will achieve a considerable level of new affordable housing is preferable to the uncertain outcome of an appeal, which might result in a lower offer.
- 6.5. The existing permission was to provide us with an overall level of affordable of 35% by calculation of habitable rooms. This comprised 60 intermediate units and 9 Social Rent units on site and a financial contribution of £12.57million. The intermediate units would have been required to be available to people on incomes defined by the London Plan, but the nature of the building and the location was likely to provide units whose market values mean they might only be affordable to those at the top end of the income scale (up to £71K p.a. for these 1bed and 2bed units), who are not the borough's priority for this type of housing. The small number of social rent units would have been valuable to a few people on our waiting list, but there was some uncertainty about the level of service charges, which would be added on to the defined Social Rent levels, perhaps making these units relatively expensive compared to typical Social Rent units in the borough. There was also a degree of uncertainty about whether a suitable RP would be found with the skills to manage this small number of units within this development designed primarily for the market units, intended for private rent via the Essential Living model.
- 6.6. The current offer is to remove all affordable housing units from the development and instead provide an increased financial contribution of £17.07 million. This sum has been calculated by using our financial

consultants, BNP's assessment of the current market value of a habitable room and providing a sum which equates to 25% affordable by habitable room. Whilst this is considerably below policy requirement levels, it is the applicant's assessment of the maximum amount that the development's viability can sustain.

- 6.7. This financial contribution can be used in a number of ways. The council has already started its own programme to build new affordable housing. There are a variety of income streams which will support this programme, and S106 contributions such as the £17 million offered here, are a valuable part of this funding. There is a need for funding to supplement the council's considerable resources from Right to Buy receipts, which can only be used to contribute 30% of any future newbuild scheme costs and which the council is bound to spend by central government's fixed deadlines. It is not possible to state exactly how or where this sum might be spent to achieve new affordable housing, but one output is likely to be new housing built on the council's own land which is currently surplus to requirements. Any new housing built using this funding is more likely to meet the council's needs than the affordable units originally offered on site via the early permission. The funding will enable a range of properties to be built, including large family units which can be built in locations which are considered more suitable for families than within high rise developments.
- 6.8. In summary, the current offer is recommended for acceptance, as it provides a guaranteed financial contribution which will be able to be used effectively to produce new affordable housing built to the council's own specifications.
- 6.9. OFFICERS COMMENTS: The comments of the Housing officer and the identified benefits of the variation to the section 106 are noted and discussed in the material considerations section of the report.

LBTH Legal

- 6.10. This current application is under s106A of the Planning Act 1990 which allows the parties to agree modifications to the original 2009 agreement, in addition to those agreed in 2014.
- 6.11. The current appeal is made under S106BA and relates solely to the provision of affordable housing. The hearing originally set for October has been adjourned to allow time for the parties to reach an agreed alternative.
- 6.12. If this application is refused, the hearing will be reinstated and it will be for an Inspector to decide both on the amount of on-site provision of affordable housing and any financial contributions for off-site affordable housing.
- 6.13. The hearing will generate financial costs and take up officer time. There is also the risk that the Inspector could reduce either the on site provision or the off site contribution, leaving the Council with limited options for challenging that decision.

- 6.14. OFFICERS COMMENTS: The comments of the LBTH Legal Officer noted and discussed in the material considerations section of the report.

External Responses

Greater London Authority

- 6.15. No comments received to date.

7. LOCAL REPRESENTATION

- 7.1. The proposed deed of variation proposed under legislation Section 106a does not require consultation of neighbouring properties.

8. MATERIAL PLANNING CONSIDERATIONS

- 8.1. Town and Country Planning Act 1990 Section 106A Modification and discharge of planning obligations section 1 states:

(1)A planning obligation may not be modified or discharged except—

- (a) by agreement between [F2the appropriate authority (see subsection (11))] and the person or persons against whom the obligation is enforceable;*
- (b) in accordance with this section and section 106B.*

- 8.2. Subsection (11) of Town and Country Planning Act 1990 Section 106A Modification and discharge of planning obligations states:

In this section “the appropriate authority” means –

(a)the Mayor of London, in the case of any planning obligation enforceable by him;

(aa)the Secretary of State, in the case of any development consent obligation where the application in connection with which the obligation was entered into was (or is to be) decided by the Secretary of State;

(ab)the Infrastructure Planning Commission, in the case of any other development consent obligation;]

(b) in the case of any other planning obligation, the local planning authority by whom it is enforceable.

- 8.3. In this instance, the relevant part of subsection 11 is part (b) which refers to the Local Planning Authority (London Borough of Tower Hamlets) whom the section 106 agreement is enforceable by.

8.4. The application is made under this section 106A and in essence seeks to remove the requirement for any on-site affordable housing but also offers an increased sum for off-site provision. The committee is required to assess the merits of that proposal.

9. Affordable Housing

9.1. The London Plan has a number of policies which seek to guide the provision of affordable housing in London. Policy 3.9 seeks to encourage mixed and balanced communities with mixed tenures promoted across London and provides that there should be no segregation of London's population by tenure. Policy 3.11 identifies that there is a strategic priority for affordable family housing and that boroughs should set their own overall targets for affordable housing provision over the plan period which can be expressed in absolute terms or as a percentage.

9.2. Policy 3.12 is considered to be of particular relevance as it provides guidance on negotiating affordable housing provision on individual sites. The policy requires that the maximum reasonable amount should be secured on sites, having regard to:

- Current and future requirements for affordable housing at local and regional levels;
- Affordable housing targets;
- The need to encourage rather than restrain development;
- The need to promote mixed and balanced communities;
- The size and type of affordable housing needed in particular locations; and,
- The specific circumstances of the site.

9.3. The supporting text to the policy encourages Boroughs to take a reasonable and flexible approach to affordable housing delivery as overall, residential development should be encouraged rather than restrained.

9.4. The Local Plan seeks 35%-50% affordable housing by habitable room to be provided, but subject to viability as set out in part 3a of the Core Strategy.

9.5. The London Plan and NPPF also emphasise that development should not be constrained by planning obligations. Paragraph 173 of the NPPF states that: "the sites and scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened."

9.6. Policy 3.12 of the London Plan is clear that viability is a consideration when negotiating affordable housing "negotiations on sites should take account of their individual circumstances including development viability" and the need to encourage rather than restrain development.

9.7. Core Strategy Policy SP02 (3) set an overall strategic target for affordable homes of 50% until 2025. This will be achieved by requiring 35%-50% affordable homes on sites providing 10 new residential units or more

(subject to viability). The preamble in 4.4 states that “given the extent of housing need, Tower Hamlets has set an affordable housing target of up to 50%. This will be delivered through negotiations as a part of private residential schemes, as well as through a range of public initiatives and effective use of grant funding. In some instances exceptional circumstances may arise where the affordable housing requirements need to be varied. In these circumstances detailed and robust financial statements must be provided which demonstrate conclusively why planning policies cannot be met. Even then, there should be no presumption that such circumstances will be accepted, if other benefits do not outweigh the failure of a site to contribute towards affordable housing provision”.

9.8. Managing Development Document Policy DM3 (3) states 3. Development should maximise the delivery of affordable housing on-site.

A. Any off site affordable housing will only be considered in circumstances where it can be demonstrated that:

- i. It is not practical to provide affordable housing on site;
- ii. to ensure mixed and balanced communities it does not result in too much of any type of housing in one local area;
- iii. it can provide a minimum of 50% affordable housing overall;
- iv. it can provide a better outcome for all of the sites including a higher level of Social Rent Family homes; and
- v. future residents living on all sites use and benefit from the same level and quality of local services

B. If a suitable site cannot be found, as stated in parts I to V, in exceptional circumstances the Council will consider payments in-lieu ring fenced for additional affordable housing input.

9.9. The preamble of MDD Policy DM3 para 3.6 states ‘The Council considers that in the majority of cases, it is feasible for affordable housing to be delivered on site. This is important in promoting mixed and balanced communities. If affordable housing is proposed to be provided off-site there should be no over concentration of one type of housing in any one place both off-site and on site and a minimum of 50% affordable housing must be provided overall (subject to viability).

9.10. The preamble of MDD Policy DM3 para 3.7 also states, if no suitable sites are available for off-site affordable housing and payment in-lieu is to be acceptable the developer must demonstrate that the payment will result in the equivalent of a minimum of 50% affordable housing. The Council may use these resources to enable the provision of new affordable housing or to support regeneration on existing housing estates.

Reduction in affordable housing provision overall

9.11. The existing 2009 and 2014 consents were secured with affordable housing contributions and provisions that would provide 35% affordable housing schemes.

- 9.12. The proposed variation to the section 106 agreement would decrease the affordable housing provision to 24.8% and result in an entirely off-site affordable scheme.
- 9.13. The 2009 consent was approved at Strategic Development Committee with the equivalent of a 35% affordable housing provision instead of the 50% normally required for an off-site provision, as the application was supported by an independent assessment of viability.
- 9.14. The proposed variation to the planning obligations seeks to reduce the secured affordable housing provision from 35% to 24.8%.
- 9.15. BNP Paribas who were independently instructed to review the viability of the 2014 scheme have confirmed that 2014 consent is not viable with the existing 35% affordable housing provision secured with the existing legal obligations.
- 9.16. The creation of an unviable scheme following a reduction in the approved number of residential units on site constitutes an exceptional circumstance where the affordable housing requirements need to be varied, as detailed and robust financial statements have been provided which demonstrate conclusively why planning policies 50% affordable housing provision target cannot be met in accordance with the requirements of Core Strategy Policy SP02(3).
- 9.17. The approval of the proposed modification to the affordable housing contribution which is based on 'individual circumstances including development viability' and would ensure that the sites and scale of development identified in the plan would not be subject to such a scale of obligations and policy burdens that threaten their ability to be developed viably in accordance with London Plan Policy 3.12 and NPPF Paragraph 173.

Removal of on-site affordable units

- 9.18. London Plan Policy 3.9 and 3.11 seeks to encourage mixed and balanced communities with mixed tenures and the delivery of affordable housing.
- 9.19. The 2009 consent was approved with no affordable family housing on site, as members of the Strategic Development Committee previously expressed concerns about the provision of family accommodation in this location given the sites characteristics as a traffic island and connectivity, noise and air quality issues.
- 9.20. The secured off site affordable housing contribution of £12,857,000 was therefore secured to off-set the absence of on-site family affordable housing provisions.

- 9.21. The existing sixty six affordable units secured on site, as a consequence only compromise of one and two bedroom units. Moreover, only nine of the affordable units are secured as social rented housing.
- 9.22. The LBTH Housing officer has raised a number of concerns with the affordability and potential service charges of the on-site one and two bed affordable housing units and confirms that the acceptance of the increased affordable housing contribution could further aid the Councils own programme to build more affordable housing.
- 9.23. The LBTH Housing officer as a consequence recommends approval of modification to the legal agreement, as the requirement for a variation are supported by a viability report which has been independently reviewed and provides a guaranteed financial contribution for the Council which could be used to produce new affordable housing built to the Councils own specifications.
- 9.24. On balance, it is therefore considered that the proposed modification to the legal agreement to remove the on-site affordable housing provisions, reduce the overall affordable housing provision and increase the financial affordable housing contribution, which is supported by an independently reviewed Viability assessment is considered acceptable in accordance with Managing Development Plan Policy DM3, Core Strategy Policy SP02 (3), London Plan Policy 3.9, 3.11 and 3.12 and NPPF Paragraph 173.

10. Other Issues

- 10.1. The applicant has appealed against the refused s106b application which seeks to remove all 66 affordable housing units on-site and reduce the payment for off-site affordable housing to £1,990,000.00.
- 10.2. The Appeal Hearing was original scheduled for 7 October 2015 but was postponed by mutual consent between LPA and Essential Living, as both parties sought to negotiate and agree to a revised affordable housing provision outside of the appeal process.
- 10.3. In the event that the Strategic Development committee agree to the approval of the proposed modification to the section 106 and revised affordable housing provision, the applicant confirmed that the appeal would be withdrawn.
- 10.4. Alternatively, if the Strategic Development committee are minded to refuse the proposed variation to the section 106 and affordable housing provision the appeal hearing will be rescheduled for November 2015 and any potential revisions to the s106 agreement would be based on the conclusions of the Planning Inspectorate.
- 10.5. It is of note that Essential Living have provided detailed viability reports which the Councils independent viability consultants BNP Paribas have confirmed demonstrate that the 2014 consent is not viable with the existing

section 106 agreement. Further to this, BNP Paribas advised the LPA that the affordable housing provision should be reduced on a pro-rata basis to £8,424,130 to reflect the reduction in the units approved in the 2014 consent in comparison to the 2009 consent.

- 10.6. On balance, although the provision of affordable housing is less than the Development plan seeks to secure, Officers of the Council recommend the approval of the variation to the legal agreement under S106A which
- Removes the requirement for on-site affordable housing
 - Increases the off-site contribution to £17,074,949

OTHER

Financial Considerations

Localism Act (amendment to S70(2) of the TCPA 1990)

- 10.7. Section 70(1) of the Town and Country Planning Act 1990 (as amended) entitles the relevant authority to grant planning permission on application to it. Section 70(2) requires that the authority shall have regard to:
- The provisions of the development plan, so far as material to the application;
 - Any local finance considerations, so far as material to the application; and,
 - Any other material consideration.
- 10.8. Section 70(4) defines “local finance consideration” as:
- A grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown; or
 - Sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy.
- 10.9. In this context “grants” might include New Homes Bonus.
- 10.10. These are material planning considerations when determining planning applications or planning appeals.
- 10.11. As regards Community Infrastructure Levy considerations, Members are advised that that the London mayoral CIL became operational from 1 April 2012, however, as the development was originally approved prior to the adoption of CIL, the scheme is exempt.
- 10.12. The New Homes Bonus was introduced by the Coalition Government during 2010 as an incentive to local authorities to encourage housing development. The initiative provides un-ring-fenced finance to support local infrastructure development. The New Homes Bonus is based on actual council tax data which is ratified by the CLG, with additional information from empty homes

and additional social housing included as part of the final calculation. It is calculated as a proportion of the Council tax that each unit would generate over a rolling six year period.

- 10.13. Using the DCLG's New Homes Bonus Calculator, this development, would generate in the region of £564,385 in the first year and a total payment of £3,386,310 over 6 years.

Human Rights Considerations

- 10.14. In determining this application the Council is required to have regard to the provisions of the Human Rights Act 1998.

- 10.15. In the determination of a planning application the following are particularly highlighted to Members:-

- 10.16. Section 6 of the Human Rights Act 1998 prohibits authorities (including the Council as local planning authority) from acting in a way which is incompatible with the European Convention on Human Rights. "Convention" here means the European Convention on Human Rights, certain parts of which were incorporated into English law under the Human Rights Act 1998. Various Convention rights are likely to be relevant, including:-

- Entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of a person's civil and political rights (Convention Article 6). This includes property rights and can include opportunities to be heard in the consultation process;
- Rights to respect for private and family life and home. Such rights may be restricted if the infringement is legitimate and fair and proportionate in the public interest (Convention Article 8); and,
- Peaceful enjoyment of possessions (including property). This does not impair the right to enforce such laws as the State deems necessary to control the use of property in accordance with the general interest (First Protocol, Article 1). The European Court has recognised that "regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole".

- 10.17. This report has outlined the consultation that has been undertaken on the planning application and the opportunities for people to make representations to the Council as local planning authority.

- 10.18. Were Members not to follow Officer's recommendation, they would need to satisfy themselves that any potential interference with Article 8 rights will be legitimate and justified.

- 10.19. Both public and private interests are to be taken into account in the exercise of the Council's planning authority's powers and duties. Any interference with a Convention right must be necessary and proportionate.
- 10.20. Members must, therefore, carefully consider the balance to be struck between individual rights and the wider public interest.
- 10.21. As set out above, it is necessary, having regard to the Human Rights Act 1998, to take into account any interference with private property rights protected by the European Convention on Human Rights and ensure that the interference is proportionate and in the public interest.
- 10.22. In this context, the balance to be struck between individual rights and the wider public interest has been carefully considered.

Equalities Act Considerations

- 10.23. The Equality Act 2010 provides protection from discrimination in respect of certain protected characteristics, namely: age, disability, gender reassignment, pregnancy and maternity, race, religion or beliefs and sex and sexual orientation.
- 10.24. The Act places the Council under a legal duty to have due regard to the advancement of equality in the exercise of its powers including planning powers. In particular the Committee must pay due regard to the need to:
- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
 - Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and,
 - Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 10.25. the Committee must be mindful of this duty, inter alia, when determining all planning applications
- 10.26. Officers have taken the duty into account in the assessment of the application and consider that the changes proposed to the 106 are unlikely to have either a disproportionately negative or positive impact on persons in the Borough of Tower Hamlets who share a protected characteristic.

11. Conclusion

- 11.1. All other relevant policies and considerations have been taken into account. Variation to the Section 106 should be approved for the reasons set out and the details of the decisions are set out in the RECOMMENDATIONS at the beginning of this report.