

SOUTHWARK COUNCIL

S106 Monitoring and Deed of Variation (DoV) administration process in Southwark

Legislative background:-

1. S106 Planning Obligations entered into in accordance with S106 of the Town and Country Planning Act 1990 (as amended).
2. A planning obligation is a material consideration under section 70(2) of the 1990 Act provided that it meets the tests of Regulation 122 of the Community Infrastructure Regulations 2010, which states that an obligation must be:
 - a) necessary to make the development acceptable in planning terms;
 - b) directly related to the development; and
 - c) fairly and reasonably related in scale and kind to the development.
3. S106A – A planning obligation may not be modified or discharged except by agreement between the parties OR in accordance with S106A, S106B or S106BA or S106BC.
4. S106A – S106 obligation can only be modified or discharged by application if 5 years have passed from when it was entered into. Anything within 5 years has to be done by the agreement of the parties.
5. S106B – Allows Developer to appeal to the Secretary of State a Council's failure to determine an application for modification or discharge of a S106 obligation made under S106A.
6. S106BA – specifically relates to modification or discharge of affordable housing requirements – usually due to viability.
7. S106BC – provides for an appeal to the Secretary of State in relation to an application made under S106BA.

S106 Monitoring

8. The Council aims to review compliance of the major aspects of each S106 obligation (payments, Affordable Housing provision and works in kind) every 12-18 months. Should any concerns arise the following process should be followed:
 - **Stage 1**, monitor the obligations / respond to any concerns raised.
 - **Stage 2**, investigate concerns and identify potential remedies.
 - **Stage 3**, negotiate compliance in full; or seek legal / court action (subject to Head of Development Management approval); or agree an alternative provision through a Deed of Variation (subject to an application made under S106A or S106BA and Head of Development Management approval).

Deed of Variation

9. In accordance with the legislative framework there are therefore 3 Deed of Variation options:-
 - Option 1 – By application
 - Option 2 – By appeal
 - Option 3 – By agreement
10. In Southwark the majority of our Deeds of Variation are entered into following an application under Option 1 and then a bilateral agreement under Option 3.

11. Any applications made under S106A, under S106B or any other proposal to vary the S106 obligation are processed through a formal application to vary or discharge a s106 obligation and the Deed of Variation is always entered into with the agreement of the parties. This involves the registration of the application, a planning officer report and recommendation and determination by either the Head of Development Management or Planning Committee as appropriate.
12. The Council's procedure does not allow for s106 obligations to be varied through any informal process.

Bermondsey Spa Site C: 10-AP-3010

13. In accordance with the Council's monitoring arrangements for s106 obligations (as set out in paragraph 8 above), monitoring of the s106 obligations for this scheme has taken place.
14. The Council has investigated the provision of Affordable Rent on this site rather than Social Rent which was required by the S106 agreement. The Council has reviewed the detailed wording used in the S106 planning obligation for the site and has sought advice from the Council's legal department. It is understood that Notting Hill is also seeking advice in relation to the wording of the agreement. It is not yet clear whether the parties agree on the correct interpretation. If there is any difference between what was originally sought in the S106 obligation and what has been delivered on site, steps will need to be taken to rectify the position, whether by agreement (eg. variation of the S106, by the procedures outlined in paragraphs 9-11 above) or through enforcement.
15. The Council has investigated the delivery of 102 Intermediate Units as opposed to the 24 Intermediate Units required by the S106 obligation. As the requirement for 24 Intermediate Units has been met and there is no restriction in the s106 obligation on specific delivery of the tenure of the Remaining Units, these other 78 Units can be let or sold on any terms and therefore the Council is satisfied to have the 78 Remaining Units instead delivered as 78 Intermediate Units. No further action required.

Table 2: Edmund Street: 11-AP-4309

16. In accordance with the Council's monitoring arrangements for s106 obligations (as set out in paragraph 8 above), monitoring of the s106 obligations for this scheme has taken place. A Deed of Variation to the S106 obligation has been agreed in respect of a change of tenure from Affordable Rent Units to Social Rent Units in order to accommodate tenants from the Aylesbury Estate. The Council has investigated the delivery of 59 Social Rent Units and 4 Affordable Rent Units as opposed to the 41 Social Rent Units and the 22 Affordable Rent Units required by the S106 obligation. The definition of Affordable Rent in the s106 Agreement can be interpreted flexibly enough to allow for them to be delivered as Social Rent Units, therefore these 18 additional Social Rent Units fall within the definition of Affordable Rent Units. The Development is not fully occupied so monitoring of the S106 obligations is still an on-going process.
17. The Council has investigated the delivery of 120 Intermediate Units on site as opposed to the 24 Intermediate Units required by the S106 obligation. As the requirement for 24 Intermediate Units has been met and there is no restriction in the s106 obligation on specific delivery of the tenure of the Remaining Units, these additional 96 Units can be let or sold on

any terms and therefore the Council is satisfied to have these 96 Remaining Units instead delivered as 96 Intermediate Units. The development is not fully occupied so monitoring of the S106 obligations is still an on-going process.

18. Overall there is an over provision of Affordable Housing on the Site from what was secured in the original S106 obligation.

Jamaica Road/Abbey Street: 12-AP-3127

19. The Council has investigated the delivery of 42 Intermediate Units as opposed to the 5 Intermediate Units required by the S106 obligation. As the requirement for 5 Intermediate Units has been met and there is no restriction in the S106 obligation on specific delivery of the tenure of the Remaining Units, these additional 37 Units can be let or sold on any terms and therefore the Council is satisfied to have these 37 Remaining Units instead delivered as Intermediate Units. No further action required.
20. Overall there is an over provision of Affordable Housing on the Site from what was secured in the original S106 obligation.

AYLESBURY Site 1a: 07-AP-0046

21. The Aylesbury Area Action Plan 2007 (policy BH3: Tenure mix) requires 50% of the new housing across the action area to be affordable housing.
22. As set out in the document tabled by the Council at the CPO Inquiry on the 1st May 2015: 'Southwark Council note: Affordable rent', planning consent was granted for 90 Social Rented Units, 29 Intermediate Units and 141 Private Units. The total affordable housing proposed (units) was 46% affordable housing (119 units), and this was agreed by Planning Committee. This breakdown of number of social rented and intermediate units was secured in the S106 obligation.
23. A Deed of Variation was subsequently agreed to increase the amount of Social Rented Units from 90 units to 101 units and to increase the amount of Intermediate Units from 29 to 33 units. This increased the percentage of affordable housing to 51.5%.
24. The scheme is now complete and occupied, with 101 Social Rented Units, 33 Intermediate Units and 127 Private Units. This equates to 51.3% of units as affordable housing. It delivers the aspirations of the AAP for 50% affordable housing across the action area core. It also improves the tenure mix agreed at Planning Committee by providing more social rented and intermediate housing than originally envisaged.
25. In accordance with the Council's monitoring arrangements for S106 obligations (as set out in paragraph 8 above), monitoring of the S106 obligations for this scheme has taken place. The applicant submitted an application to vary the S106 obligation and a Deed of Variation was authorised by Planning Committee and entered into by the Council and the Developer. The development has been completed and compliance with the Deed of Variation has been achieved.

AYLESBURY Site 7: 12-AP-2332

26. The Aylesbury Area Action Plan 2007 (policy BH3: Tenure mix) requires 50% of the new housing across the action area to be affordable housing.
27. As set out in the tabled document: 'Southwark Council note: Affordable rent', planning consent was granted for 49 Social Rented units, 27 Intermediate Units and 71 Private Units. The total affordable housing (units) proposed was 51.7% (76 units). The S106 obligation secured this tenure mix.
28. Evidence underpinning the CPO for Site 7 also set out the same breakdown in tenure. Paragraph 6.8 of the evidence of Tim Cutts (CD 29 page 1924) sets out that the "Scheme proposed to provide 76 affordable homes".
29. The scheme is currently under construction and the Council is satisfied that the development is proceeding in accordance with the terms of the planning application and the s106 obligation. The development will be officially monitored in terms of compliance with the S106 obligations in due course.

11 May 2015