

## LONDON BOROUGH OF WALTHAM FOREST

Committee/Date:	Planning – 8 <sup>th</sup> October 2024
Application reference:	241367
Applicant:	Marsh Lane (Leyton) LLP
Location:	Former Percy Ingles Site, Unit 2 210 Church Road, Leyton, London, E10 7JQ
Proposal:	<p>Deed of Variation to the Deed of Agreement dated 9<sup>th</sup> February 2024 made under the provisions of Section 106 of the Town and Country Planning Act 1990 (as amended) in relation to the planning permission granted under reference 220695 for the following development:</p> <p><i>The demolition of the existing single storey industrial building and structures that contain 4,013 sqm of light industrial floorspace Class E (g) (iii) and office accommodation (Class E (g) (i) and the construction of new building blocks that would range between three to seventeen storeys in height to accommodate 213 residential homes (Use Class C3), new light industrial floorspace (Class E (g) (iii) and office workspace (Class E (g) (i) together with the creation of new public realm and landscaping improvements, provision of 11 disabled parking spaces, cycle parking, refuse stores, new servicing arrangements, highways works and associated developments</i></p> <p>The Deed of Variation would have the effect of amending the Deed of Agreement to allow for delivery of affordable housing as per the original deed <b>or</b> the following alternative:</p> <ul style="list-style-type: none"> <li>• Removal of the requirement to provide on-site affordable housing; and</li> <li>• Securing of a financial contribution towards off site provision of affordable housing (a payment in lieu) of £1million.</li> </ul> <p>Together with any other revisions that are deemed necessary to allow the drafting to be legally sound.</p>
Ward	Lea Bridge
Appendices:	<p>Appendix 1: 220695 Report to Planning Committee 2nd May 2023</p> <p>Appendix 2: 220695 Update Report to Planning Committee 2nd May 2023</p> <p>Appendix 3: 220695 Legal Agreement made under Section 106 of the Town and Country Planning Act 1990 (as amended) dated 9th February 2024</p> <p>Appendix 4: Summary of consultation responses received in respect of 240779 (application made under Section 73 of the Town and Country Planning Act 1990 (as amended)</p>

### 1. RECOMMENDATION

- 1.1 That the Planning Committee resolves to enter into a Deed of Variation under Section 106A of the Town and Country Planning Act 1990 (as amended) to vary the Section 106 Legal Agreement associated with planning permission reference 220695 and delegates authority to the Assistant Director of Development Management to agree the wording of the Deed of Variation.
- 1.2 The Deed of Variation would have the effect of providing two options for the provision of affordable housing.
- 1.3 The first would allow for the provision of 20% onsite affordable housing (by habitable room) as per the existing obligation. This option would be enacted by the developer in the event that the viability position improves. The second, which would introduce the option to instead secure the payment of a financial contribution of £1 million (indexed from date of planning decision) towards the provision of affordable housing elsewhere within the borough (a payment in lieu) as alternative to provision of on-site affordable housing.
- 1.4 Additional amendments to the original wording of the deed would be necessary, including a requirement for the developer to confirm which of the affordable housing options are to be enacted, and revisions to the review mechanism clauses.
- 1.5 No other changes are proposed to the consented development.
- 1.6 The submission has been referred to Planning Committee due to the nature and scale of the changes to the approved development, and because the original planning permission was considered by the Planning Committee.

## 2. PLANNING HISTORY

- 2.1 The relevant planning history is set out in the Table 1.

Application reference	Development description	Outcome
240779	Variation of condition 2 (approved documents and drawings) of planning permission 220695 granted 09/02/2024 (demolition of the existing single storey industrial building and structures that contain 4,013 sqm of light industrial floorspace Class E (g) (iii) and office accommodation (Class E (g) (i) and the construction of new building blocks that would range between three to seventeen storeys in height to accommodate 213 residential homes (Use Class C3), new light industrial floorspace (Class E (g) (iii) and office workspace (Class E (g) (i) together with the creation of new public realm and landscaping improvements, provision of 11 disabled parking spaces, cycle parking, refuse stores, new servicing arrangements and highways works). For the purposes of consultation only, the effect of the variation would be to change the housing tenure to 100% market.	Currently under consideration
220695	The demolition of the existing single storey industrial building and structures that contain 4,013 sqm of light industrial floorspace Class E (g) (iii) and office accommodation (Class E (g) (i) and the construction of new building blocks that would range between three to seventeen storeys in height to accommodate 213 residential homes (Use Class C3), new light industrial floorspace (Class E (g) (iii) and office workspace (Class E (g) (i) together with the creation of new public realm and landscaping improvements, provision of 11 disabled parking spaces, cycle parking, refuse stores, new servicing arrangements, highways works and associated developments.	Approved subject to conditions and S106 agreement – 9 <sup>th</sup> February 2024
214007	Request for EIA Screening Opinion in relation to proposed re-development at the Percy Ingle Site, Marsh Lane.	Screening Opinion Issued 21st January 2022

- 2.2 A resolution to grant planning permission was taken by the Planning Committee at the meeting held on 2<sup>nd</sup> May 2023 and a decision notice was subsequently issued on 9<sup>th</sup> February 2024 for the demolition of existing buildings onsite and the construction of a

mixed use residential led development comprising five blocks of between three and seventeen storeys in height, delivering 4,294m<sup>2</sup> of flexible industrial-related employment floorspace falling within Use Classes E (g) (i) and E (g) (iii) and 213 residential homes, together with associated works. The report and addendum report to Planning Committee are attached to this report as **Appendices 1 and 2** respectively.

- 2.3 An application has subsequently been made under Section 73 of the Town and Country Planning Act 1990 (as amended) to vary condition 2 (approved plans) attached to planning permission 220695 to allow the introduction of a tenure plan which would identify that all residential accommodation provided by the development shall be market housing. This application, which would result in a new, standalone planning permission that would sit alongside the original, is currently under consideration.

### **3. PROPOSAL**

- 3.1 The proposal before Members is a submission for a Deed of Variation to the Legal Agreement associated with planning permission 220695 to remove the requirement for the developer to provide on-site affordable housing, and instead to provide a financial contribution of £1 million towards off-site affordable housing. A copy of the Legal Agreement is attached to this report as **Appendix 3**. The Deed of Variation submission runs concurrently with an application made under Section 73 (see paragraph 2.3).
- 3.2 The Deed of Variation relates only to affordable housing provisions and associated clauses, and would not result in any other changes to either the approved development or the Legal Agreement.
- 3.3 The Deed of Variation would, if approved, vary the terms of the original Section 106 Legal Agreement as set out in this report, and sit alongside the original planning permission and any subsequent Section 73 consent, if approved.

### **4. CONSULTATION**

- 4.1 There is no statutory requirement to carry out consultation on a submission made under Section 106A to modify or discharge planning obligations secured under an existing Legal Agreement.
- 4.2 Notwithstanding the above, a full consultation has been undertaken in respect of the concurrent application for amendments to the original planning permission made under Section 73, including a stage 1 referral to the Mayor of London.
- 4.3 A summary of the consultation responses received is attached as **Appendix 4** for information, however please note that they relate to the Section 73 application, and not the submission before Members to enter into a Deed of Variation.

### **5 DEVELOPMENT PLAN AND RELEVANT LEGISLATIVE PROVISIONS**

- 5.1 Section 106A of the Town and Country Planning Act 1990 (as amended) makes provision for existing planning obligations to be modified or discharged by agreement between the authority and the person or persons by whom the obligation is enforceable. Section 106A enables modification or discharge to be achieved either by an agreement with the Local Planning Authority (which must be executed as a deed), or by an application to the Local Planning Authority.
- 5.2 For obligations entered into after 6 April 2010 an application can only be made after 5 years beginning with the date the obligation has been entered into to. However, the

Council may (at its own discretion), agree to vary obligations to a Legal Agreement within this period. In this case, as the original obligation was made within the last 5 years, an obligation can only be modified or discharged through an agreement with the Local Planning Authority (which must be executed as a deed). In such cases, there is no right of appeal under Section 106B if any such application is refused but such a decision would be open to challenge via judicial review.

5.3 The Local Planning Authority may determine:

- (a) That the planning obligation shall continue to have effect without modification; or
- (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.

5.4 As the submission is made under Section 106A of the Town and Country Planning Act 1990 (as amended), and would not result in a new planning permission, regard is not required to be had to the Development Plan or National Planning Policy Framework (NPPF) in the determination of the application, relevant case law establishing that the assessment of such applications does not bring in the full range of planning considerations involved in determining an application for planning permission<sup>1</sup>. Nonetheless, the Development Plan and NPPF are material considerations and Members will be aware that London Plan policy H5 (Threshold approach to applications) requires submissions for scheme amendments (including deeds of variations) to be accompanied by viability information; this has been done in this case.

5.5 Guidance on the assessment of viability information for the purposes of reaching a determination on planning matters is set out in the NPPF and National Planning Policy Guidance, and regard has been had to the relevant advice. Members will be aware of the government consultation which has recently closed on amendments to the NPPF which include revisions to how viability may be approached for the purposes of Planning, however these changes have not been confirmed or adopted at the current time.

## 6. DETAILED CONSIDERATION OF THE PROPOSED AMENDMENTS

### *Introduction of an “either/or” mechanism to allow provision of on-site affordable housing or an alternative*

6.1 The aspiration of the Development Plan, both at local and regional levels, is delivery of 50% of all new homes as genuinely affordable housing, with a local threshold of 35% onsite affordable housing below which a viability assessment will be required.

6.2 In this case, the proposed development was assessed as being in financial deficit at the time of the resolution to grant and issuing of the decision notice. The extent of deficit of the scheme at that time, delivering 20% onsite affordable housing, was agreed following independent review as being -£18.3million (-16.12% on Gross Development Value [GDV], delivering a net profit of £360,131 or 0.32% on GDV), and as a result, it was agreed between the parties that no affordable housing could be delivered beyond the 20% proposed by the applicant at the time, together with other financial obligations, and it was on this basis that the application was approved by Members.

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<sup>1</sup> R (The Garden and Leisure Group Ltd) v North Somerset Council [2003] EWHC 1065 (Admin) and R (Mansfield DC) v Secretary of State for Housing, Communities and Local Government [2018] EWHC 1794 (Admin)

- 6.3 The current agreed extent of the scheme deficit as a 100% market housing development is -£9million. Whilst the level of deficit has reduced with the removal of the requirement to provide on-site affordable housing from the scope of the proposal, the development remains in overall deficit. The Council's independent viability consultants have scrutinised the applicant's submission closely, and whilst there have been some areas of disagreement (which have been resolved), it is agreed that the scheme remains in deficit.
- 6.4 Whilst the obligation to deliver 20% onsite affordable housing would (on paper) continue to serve a useful purpose, if the effect of the obligation as currently set out in the Legal Agreement is to prevent the development from coming forward on the grounds of viability, this would be detrimental to planning objectives to deliver sustainable housing and local environmental enhancements more generally. The proposed wording would retain the original option in the event of an improvement in scheme viability, but allow flexibility to ensure that the scheme moves forward regardless of the viability context, enabling the delivery of the other planning benefits of the development regardless of the financial context if there is no improvement in scheme viability.

*Securing of a payment in lieu of £1million towards offsite provision of affordable housing*

- 6.5 The applicant has, notwithstanding the scheme deficit, offered a payment in lieu of £1million towards off site provision of affordable housing within the borough in the event that the option to not deliver onsite provision is enacted. This sum has not been considered within the financial viability assessment and has not been viability tested as it sits outside of the financial assessment for the site, however the proposed drafting of the Deed of Variation would secure payment of sum in the event that the alternative (no onsite delivery) is pursued).
- 6.6 London Plan policy H4 (Delivering affordable housing) sets out that cash in lieu payments should only be agreed in exceptional circumstances. In this case, the scheme is in deficit and if the suggested variations are not agreed, the development is unlikely to come forward within the lifespan of the consent, depriving the borough of high-quality market housing as well as the 32 onsite affordable housing units.
- 6.7 Off site provision of affordable housing is not appropriate in this case; the applicant does have other current development sites within the borough, however these are all purpose-built student accommodation schemes. The introduction of affordable conventional housing within such developments would not be supported on the basis that affordable and market housing should be co-located, and that delivery of conventional affordable housing within a specialist housing development would potentially result in a perception of ghettoisation. Furthermore, purpose built student accommodation is not subject to the same minimum standards of housing accommodation as conventional accommodation, and as such, any such affordable housing delivered within such schemes would be likely to fail to meet local or regional space standards or provide adequate private amenity space for occupiers.
- 6.8 With these limitations in mind, the alternative proposed is a financial contribution which would be secured for the delivery of affordable housing in the borough. It is suggested that the payment in lieu be utilised for the unlocking of grant funding (effectively having a multiplier effect on the funding of affordable housing) within existing schemes, which would represent a significant planning benefit. The Affordable Housing Strategic Sites Delivery Programme report approved by Cabinet on 9 July 2024 outlined proposals to take forward work to advance five strategic sites across the borough. This involves

£190m of GLA grant with match funding from the Council in the form of section 106 financial contributions and Right to Buy receipts. The payment in lieu would be used for this.

- 6.9 This could be to the benefit of the Lea Bridge Station sites, or the Willow House, Avenue Road, Montague Road or Patchworks regeneration projects.
- 6.10 The trigger for payment of the contribution has been agreed as 100% on commencement.
- 6.11 Notwithstanding the above, the proposed wording will allow for the option to deliver onsite affordable housing in the event that the viability of the development improves.

#### *Assessment of scheme viability*

- 6.12 As set out above, the application to vary the deed as well as the parent permission, were accompanied by financial viability assessments undertaken by Redloft, which were thoroughly reviewed by the Local Planning Authority's independent assessors of planning viability.
- 6.13 The initial viability assessment provided by the applicant in support of the Deed of Variation submission concluded that the scheme would generate a profit of 8.19% (£10,321,725) of Gross Development Value (GDV), which would be below the agreed benchmark profit rate of 17.24% of GDV.
- 6.14 This report was scrutinised by both the Council's independent assessors of financial viability (BPS) and the GLA (under the scope of the Section 73 application, see paragraph 4.2). These reviews raised queries over various inputs and assumptions, and consequently a rebuttal to the reviews was provided by Redloft on behalf of the applicant team, while BPS provided a response to the GLA's review, which set out the Local Authority's position in relation to points agreed and disagreed with the GLA.
- 6.15 The GLA has not provided any further submissions beyond the initial review of viability and the Stage 1 report.
- 6.16 Following exchange of Redloft's rebuttal and BPS' response to the GLA's reports, the matters that remained in dispute between the applicant and the Local Authority were resolved, namely pre-sales rate and sales period, finance rate (agreed at 7% in favour of the BPS position), and Benchmark Land Value (Landowners Premium reduced from 10% to 5% in light of the potential removal of onsite affordable housing delivery from the proposal).
- 6.17 The outcome of the review is that it is agreed that the scheme is in deficit by £9,054,017 (-7.17% on GDV), delivering a net profit of £12.7million (10% of GDV) when delivered as a 100% market housing development. Although the level of deficit has reduced with the omission of the onsite affordable housing previously proposed, it is agreed that the development remains non-viable with an entirely market scheme, notwithstanding that the scheme would be more profitable than an iteration which includes the delivery of affordable housing.
- 6.18 However, notwithstanding this, the proposed revisions include an "either/or" provision retaining the option of providing 20% onsite affordable housing to allow for improvements in viability to be captured as onsite provision, reflecting the policy preference, in addition to which, in line with London Plan policy and guidance and in

recognition that market conditions change over time, early- and late-stage reviews are proposed to capture any uplift in profit over the construction period.

## 7. CONCLUSION

- 7.1 As set out above in paragraph 5.3, the Local Authority can come to three potential conclusions in respect of requests to vary a deed, and these are dealt with in turn below.
- 7.2 **The planning obligation shall continue to have effect without modification** – the applicant team has demonstrated to the satisfaction of the LPA’s independent viability consultants that the proposed development remains non-viable, and therefore that the level of affordable housing secured at application stage is undeliverable at the current time. As such, it is not reasonable for the LA to argue that the planning obligation should continue to have effect without modification.
- 7.3 **The planning obligation no longer serves a useful purpose, that is shall be discharged** – the purpose of the planning obligation is securing affordable housing in accordance with evidenced housing need within the borough and in line with Development Plan objectives. To this extent, the planning obligation serves a useful purpose, but in effect it means that the consented development is unlikely to come forward as it has been demonstrated to be unviable with delivery of onsite affordable housing as set out in the Legal Agreement as currently worded.
- 7.4 **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** – as set out above, the planning obligation continues to serve a useful purpose in respect of delivering affordable housing, however as it’s effect is to render the proposed development unviable to deliver, it does not achieve the overarching purpose of planning, which is to enable exemplary placemaking and places for people to live, work and play. However, notwithstanding the viability position, the applicant has made an offer of £1million as a payment in lieu towards offsite provision to offset the reduction in onsite provision, which would be used to unlock grant funding to allow delivery of affordable housing elsewhere within the borough.
- 7.5 It is also the case that the proposed modification allows for the retention of the original obligation as an “either/or” clause, meaning that in the event that viability improves, the option to provide onsite affordable housing remains available.
- 7.6 It is therefore recommended that the request to vary the deed is agreed. This would allow modification of the deed to allow alternative options for delivery of affordable housing, namely the original arrangement of providing 20% onsite affordable housing, or alternately secure £1 million for the provision of affordable housing within the borough as per paragraphs 6.5- 6.10 above, allowing the consented scheme to be brought forward regardless of its viability to deliver good quality, well designed employment floorspace and homes, built to high sustainability standards, together with substantial public realm and biodiversity improvements.
- 7.7 The “either/or” provision would allow onsite provision to be retained as an option in the event of an improvement in scheme viability, whilst the viability reviews proposed would also ensure that any surplus profit made is paid to the Council as a financial contribution towards affordable housing.

## **8. ADDITIONAL CONSIDERATIONS**

### Public Sector Equality Duty

- 8.1 In making your decision you must have regard to the public sector equality duty (PSED) under s.149 of the Equalities Act. This means that the Council must have due regard to the need (in discharging its functions) to:
- A Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act
  - B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s).
  - C. Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.
- 8.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
- 8.3 The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in s.149 is only one factor that needs to be considered and may be balance against other relevant factors.
- 8.4 It is recognised that the variation of the obligation to allow an alternative to the requirement to provide onsite affordable housing would potentially disadvantage those who share a protected characteristic, given that a significant proportion of occupiers of affordable housing, and in particular social rented accommodation, share protected characteristics. However, this disadvantage would be mitigated by the delivery of offsite affordable housing elsewhere through the securing of a payment in lieu, which would potentially result in a greater overall quantum by virtue of the economies of scale unlocked through pooling of contributions to unlock grant funding.
- 8.5 For this reason, it is not considered that the recommendation to agree a variation in this case will have a disproportionately adverse impact on persons with protected characteristics.

### Human Rights:

- 8.6 In making your decision, you should be aware of and take into account any implications that may arise from the Human Rights Act 1998. Under the Act, it is unlawful for a public authority such as the London Borough of Waltham Forest to act in a manner that is incompatible with the European Convention on Human Rights.
- 8.7 You are referred specifically to Article 8 (right to respect for private and family life), Article 1 of the First Protocol (protection of property). It is not considered that the recommendation to agree the variation in this case interferes with local residents' right to respect for their private and family life, home and correspondence, except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general interest and the recommendation to agree the variation is



considered to be a proportionate response to the submitted application based on the considerations set out in this report.

## **9. RECOMMENDATION**

- 9.1 The Planning Committee is recommended to AGREE to the variation of the deed associated with planning permission 220695.
- 9.2 That authority to be given to the Assistant Director of Development Management and Building Control in consultation with the Council's Legal Services for the sealing of the Deed of Variation and to agree any minor amendments to the Deed of Variation on the terms set out above.