

Appendix 19

REPLACEMENT HOUSING SECTION 106

DATED _____ []

Draft (): [date]
[lawyer]/[file no]/[partner]

(1) [LANDOWNER]

(2) [MORTGAGEE]

-TO-

(3) THE MAYOR AND BURGESSES OF THE
LONDON BOROUGH OF
HAMMERSMITH AND FULHAM

PLANNING OBLIGATION BY UNDERTAKING
relating to land at
[EARL'S COURT]
(Replacement Housing Section 106 Planning Obligation)



Pinsent Masons

THIS PLANNING OBLIGATION BY UNDERTAKING is made on

[]

BETWEEN:-

- (1) [registered office] (No [] of/whose is at [] (the "Owner"); and
- (2) [registered office] (No [] of/whose is at [] (the "Mortgagee");

TO:-

- (3) **THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HAMMERSMITH AND FULHAM** of the Town Hall, King Street, Hammersmith, London W6 9JU (the "Council").

IT IS AGREED as follows:-

RECITALS

- (A) By Planning Permissions dated [XX] September 2013 and given reference numbers ECM2-PA-03-101_A (London Borough of Hammersmith and Fulham) and PP/11/01937 (Royal Borough of Kensington and Chelsea) consent was given for the development of the Earl's Court Site to provide up to 6,775 (six thousand seven hundred and seventy five) Residential Units including up to 760 Replacement Housing Units
- (B) Parts 2 and 3 of Schedule 5 of the Principal s106 Agreement provides for the obligations and restrictions that relate to the Replacement Housing Units
- (C) Those obligations and restrictions referred to in Recital (B) require, inter alia, that if following the expiry of 5 years from the date of the Principal s106 Agreement it is proposed that a Replacement Housing Unit be Transferred to the Council then prior to such transfer the Owner should first enter into a Replacement Housing Section 106 obligation in relation to such unit (or units)
- (D) The purpose of this deed is to give effect to the obligation described in Recital (C) and creates planning obligations pursuant to s106 of the Act in relation to such unit or units identified on the plan and within the schedule both annexed to this deed

DEFINITIONS

1.1 In this Undertaking:-

- "Act" means the Town and Country Planning Act 1990
- "Application" means the application for [full/outline] planning permission dated [] submitted to the Council bearing reference number []
- "Development" means the development permitted by the Permission
- "Identified Replacement Housing Units" means the Replacement Housing Units that are the subject of this deed and are described in the Schedule hereto and shown for identification purposes only on the Plan

"Land"	means the land at [] shown edged red on the Plan
"Permission"	means a valid planning permission pursuant to the Application
"Plan"	means the plan annexed to this Undertaking
"Principal s106 Agreement"	means an agreement made between (1) EC Properties GP Limited and EC Properties Nominee Limited; (2) The Mayor and Burgesses of the London Borough of Hammersmith and Fulham; (3) The Mayor and Burgesses of the Royal Borough of Kensington and Chelsea; (4) London Underground Limited; and (5) Transport for London pursuant to S106 of the Town and Country Planning Act 1990 (as amended) etc and dated [20] September 2013 as may be varied from time to time by the agreement of the parties thereto
"Replacement Housing Unit"	has the same meaning as the term "Replacement Housing Unit" in the Principal s106 Agreement
"Replacement Housing Unit Obligations"	means the obligations and restrictions relating to the Replacement Housing Units as contained in Parts 2 and 3 of Schedule 5 of the Principal s106 Agreement
"Schedule"	means the schedule annexed hereto identifying the Replacement Housing Unit or Units to which this deed relates
"Undertaking"	means this planning obligation by undertaking

1.2 The singular includes the plural.

1.3 References to the parties to this Undertaking include not only the parties giving this Undertaking, but also the Council, and references to any party shall include the successors in title of that party.

1.4 Where a party includes more than one person any obligations of that party shall be joint and several.

1.5 References to Clauses and Schedules are references to Clauses in and Schedules to this Undertaking.

1.6 Save as otherwise provided in this Undertaking any approval in writing or consent to be given by the Council in connection with this Undertaking shall not be unreasonably withheld or delayed.

1.7 Any statute or revision of any statute referred to in this Undertaking shall be deemed to include any statutory amendment, modification or re-enactment thereof for the time being in force and any order, instrument or regulation made thereunder.

2. FORMALITIES

2.1 To the extent that the obligations contained in Clause 4 of this Deed fall within the terms of section 106 of the Act they are planning obligations for the purpose of section 106 of the Act and to the extent that they do not fall within the said terms they shall take effect as covenants pursuant to section 111 of the Local Government Act 1972.

- 2.2 The Land is the land in which the parties entering this Undertaking are interested.
- 2.3 The Owner is a party entering into this Undertaking as freeholder of the Land.
- 2.4 The Mortgagee is a party entering into this Undertaking as a mortgagee of the Land.
- 2.5 The Council is the local planning authority by whom this Undertaking is enforceable.

3. LEGAL EFFECT

- 3.1 No person shall be liable under any breach of this Undertaking unless he or it holds an interest in the part of Land in respect of which such breach occurs or held such an interest at the date of the breach.
- 3.2 This Undertaking shall not come into effect until the Planning Permission has been granted and has been implemented by the carrying out of a material operation as defined in section 56(4) of the Act.
- 3.3 If the Permission expires within the meaning of sections 91, 92 or 93 of the Act, or is revoked or otherwise withdrawn or modified by any statutory procedure without the consent of the Owner this Undertaking shall cease to have effect.
- 3.4 Nothing in this Undertaking shall be construed as prohibiting or limiting any right to develop any part of the Land in accordance with a planning permission granted by the Council or any other competent authority after the date of this Undertaking.
- 3.5 A person who is not a party to this Undertaking has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Undertaking but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

4. UNDERTAKING

The Owner covenants with the Council as follows:

- 4.1 that upon completion of this deed the Identified Replacement Housing Units shall explicitly be bound by the obligations and restrictions contained in Parts 2 and 3 of Schedule 5 to the Principal s106 Agreement such that the Identified Replacement Housing Units shall not be transferred, or otherwise disposed of or used or managed otherwise than in accordance with Parts 2 and 3 of Schedule 5 to the Principal s106 Agreement

5. CONSENT OF THE MORTGAGEE AND MORTGAGEE'S INDEMNITYⁱⁱ

- 5.1 The Mortgagee hereby consents to the completion of this Undertaking and acknowledges that from the date of this Undertaking the Land shall be bound by the restrictions and obligations contained herein.
- 5.2 Notwithstanding Clause 5.1 the Mortgagee will not incur any liability for any breach of obligations contained in this Undertaking unless and until and except to the extent that it becomes a mortgagee in possession of the Land or exercises its power of sale under its security.
- 5.3 The Owner hereby covenants to indemnify the Mortgagee in respect of any liabilities, actions, demands, proceedings, costs and expenses arising directly or indirectly as a result of having consented to the completion of the above Agreement.

6. **DISPUTE RESOLUTION**

Any dispute or difference between the parties with regard to their respective rights and obligations as to any matter or thing in any way arising out of or connected with this Undertaking shall, except as otherwise expressly provided, be referred to the decision of a single expert in accordance with the terms of Clause 11 of the Principal s106 Agreement.

EXECUTED AS A DEED by the parties on the date which first appears in this Undertaking.

EXECUTED (but not delivered
until the date hereof)
AS A DEED by affixing
the Common Seal of
[]
in the presence of:-

)
)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by affixing
the Common Seal of
[]
in the presence of:-

)
)
)
)
)
)

Director

Director/Secretary

EXECUTED (but not delivered
until the date hereof)
AS A DEED by affixing
the Common Seal of
[]
in the presence of:-

)
)
)
)
)
)

Authorised Signatory

EXECUTED as a deed)
(but not delivered until dated) by)
[])
acting by a director)
in the presence of:-)

Signature of witness

Name (in block capitals)

Address.....

.....

.....

.....

SIGNED (but not delivered)
until the date hereof)
AS A DEED by)
[])
in the presence of:-)

Signature of Witness:

Name of Witness:

Address:

SIGNED (but not delivered)
until the date hereof)
AS A DEED by)
I)
in the presence of:-)

Signature of Witness:

Name of Witness:

Address:

ⁱ Other terms can be added to assist in interpretation.

ⁱⁱ The Mortgagee's interest has to be bound, otherwise the local planning authority may not be able to enforce the obligation. It is reasonable however that this should be restricted to situations where the mortgagee goes into possession or exercises its power of sale.