

OFFER TO ENTER INTO A MINUTE OF VARIATION

(where the extent of the Premises is not being changed)



Guidance Notes

Introduction

This offer to enter into a minute of variation adopts a similar format to the PSG offer to grant a lease and the offer to sell.

It is intended for use with simple lease variations and in particular, is **not** intended for use where the *extent* of the property let under the lease is being varied.

It is intended that a draft minute of variation is annexed to the offer. The offer provides optional wording:

- where there is a Guarantor of the Tenant's obligations
- for suspensive conditions.

There is alternative wording to use depending on whether the grant of the variation will trigger automatic plot registration (i.e. where there is an extension of the term over 20 years), and depending on whether the minute of variation is registrable or not. See the notes below for more information.

We have provided that if the minute of variation is registrable the Tenant will be responsible for registration of the minute of variation in the Land Register and in the Books of Council & Session. If the minute of variation is not registrable the Landlord will be responsible for registration of the minute of variation in the Books of Council & Session.

If the Landlord is offering some sort of financial incentive to the Tenant to enter into the minute of variation you must take specialist tax advice on the VAT implications of the payment. The offer does not provide for a premium to be paid.

1 Clause 1 Definitions and Interpretation

In the same way as in the offer to grant a lease and the offer to sell we have used defined terms to streamline the text of the clauses in the offer. Ideally any terms which are defined should appear in the Definitions section rather than within the body of the offer. Delete any definitions which do not apply.

"Automatic Plot Registration" is needed if the minute of variation will make the lease a registrable lease (i.e. where the variation extends the term of the lease to over 20 years) and the Landlord's title is recorded in the General Register of Sasines, otherwise it can be deleted.

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2 Clause 2 Suspensive Conditions

There is optional wording for suspensive conditions for example obtaining the Landlord's heritable creditor's consent to the grant of the minute of variation. Insert any additional suspensive conditions in Clause 2.1.2. As the heritable creditor's consent is for the benefit of both Landlord and Tenant neither party may unilaterally waive this condition. Clause 2.2.2 deals with waiving the other suspensive conditions and can be tailored depending on whether the conditions are for the Landlord's or the Tenant's benefit. If the suspensive conditions are for the benefit of both parties Clause 2.2.1 may be amended to include the additional suspensive conditions and Clause 2.2.2 deleted. Clause 2.3 provides that both parties must assist each other to enable the suspensive conditions to be purified; whether this is included will depend on the nature of the suspensive conditions.

3 Clause 3.1 LBTT Requirements

The offer requires the Tenant to file an LBTT return, if required and pay any LBTT due within [five] Business Days of the effective date. This is because the minute of variation cannot be registered until any necessary LBTT return has been submitted and arrangements satisfactory to Revenue Scotland are made for the payment of LBTT. The Tenant must indemnify the Landlord for any loss suffered as a result of the Tenant failing to submit the LBTT return timeously.

4 Clause 3.2 Signing and Registering the Minute of Variation

There are alternative clauses depending on whether the minute of variation is registrable or not. Amend as appropriate.

5 Clause 3.3 Guarantee

The acceptance of the offer must be issued on behalf of the Guarantor, as well as on behalf of the Tenant, so that the Guarantor will be a party to the Missives.

6 Clause 4 Title

Clause 4.1 Reports and Searches

There are two versions of Clause 4.1.1 depending on whether the minute of variation is registrable or not. Use the first option where it is non-registrable. Clause 4.1.3 is only required if the minute of variation is registrable.

Clause 4.2 and 4.3 Land Register Requirements and Post Completion

These clauses are only required if the minute of variation is registrable. They mirror the provisions in the PSG offer to grant a lease and offer to sell and include a co-operation clause if the application to register the minute of variation is rejected.

Clause 4.4 Automatic Plot Registration

If the minute of variation will make the lease a registrable lease and the Landlord's title is recorded in the General Register of Sasines, the grant of the minute of variation will trigger

automatic registration of the Landlord's title in the Land Register to the extent of the lease demise.

When submitting a minute of variation for registration which triggers automatic plot registration, the onus is on the applicant (i.e. the Tenant) to ensure the application contains sufficient information to enable the Keeper to make up the title sheet for the Landlord's previously unregistered plot. The Tenant's solicitor must send the Keeper the documents required under s.22 and s.25 of the 2012 Act which will include a plan capable of being mapped, any burdens writs and any deeds creating servitudes (see the one-shot rule checklist on the Registers website). When submitting copies of the Landlord's title deeds ensure that any plans are coloured copies.

The fee payable by the Tenant for registration of the minute of variation will be calculated in the usual way regardless of the fact that automatic plot registration is triggered. Since registration of the Landlord's plot of land is induced by the same application, no additional fee will be payable.

Normally the grantor's solicitors will not approve the application form prepared by the grantee. However, the Landlord's solicitors will need to make sure that all of the questions on the application form relating to the Landlord's title have been correctly answered so that the Landlord obtains a title sheet with no exclusion or limitation of warranty and containing the correct title conditions.

The Landlord will want an email address for it or its solicitors to be included on the application form so that the Keeper can notify them about the automatic registration of the Landlord's title to the Property.

7 Clause 5 Costs

Clause 5 includes alternatives – it caters for each party bearing their own legal etc costs and it provides for alternative wording in cases where the Tenant is bearing the whole or a contribution towards the costs of the transaction. If the Tenant is to pay the whole of those costs, delete the words "[a contribution of [] (£[]) POUNDS STERLING (exclusive of VAT, which will be payable by the Tenant in addition) towards]".

8 Clause 7 Confidentiality

Consider if it is appropriate to have a confidentiality clause in the Missives given that when the minute of variation is registered either in the Books of Council & Session or in the Land Register it will be a public document. If the parties want to register the Missives you should delete this clause.

9 Clause 9 Supersession

Consider carefully if it is appropriate to include a supersession clause. If for any reason the minute of variation is not executed within the two year period the Missives will cease to have effect and the parties will not be able to rely on Clause 3.4 (terms binding as if the minute of variation had been duly executed) unless that clause is specifically included in the list of clauses that are excluded from the supersession clause. See *Gilcomston Investments Limited v Speedy Hire (Scotland) Limited* (Sheriff Court 14 September 2012 CA/2/12) where the Sheriff held there was no lease once Missives ended.

10 Clause 13 Consent to registration

Be aware of the potential conflict between this clause and the confidentiality clause (Clause 7). If the parties want to keep the terms of the Missives confidential then it is not appropriate to register the Missives in the Books of Council and Session which is a public register.