



**dated**                      **2020**

**Torbay Council**

and

**[Developer]**

and

**[Guarantor]**

## **Development and Regeneration Agreement**

relating to development and regeneration of site at [Collaton Saint Mary]  
[Preston Down Road], Torbay

***Working Draft – 25/09/2019***

Towers & Hamlin LLP  
3 Bunhill Row  
London  
EC1Y 8YZ  
t +44 (0)20 7423 8000  
f +44 (0)20 7423 8001  
[www.towers.com](http://www.towers.com)

**towers & hamlin**

## Notes for Bidders

### Structure and background

The following commercial and structural presumptions have been applied in the drafting of this Agreement:

- 1        there will be one Development Agreement for each site and, save for site specific provisions, they will be on substantially the same terms;
- 2        the Council will release ownership of the sites on a phased bases linked to achieved milestones in an agreed Build Programme. The first phase will be released and the freehold transferred following the satisfaction of usual pre-conditions e.g. the grant of planning permission. The timing and triggers for further land release and phasing will be the subject of dialogue;
- 3        the Developer shall be responsible for obtaining full Planning Permission and all other Necessary Consents – note that the Council will be responsible for certain preliminary or enabling works such as environmental mitigation measures;
- 4        the Developer will be expected to enter into a Planning Performance Agreement in a form provided by the Council as local planning authority;
- 5        the Developer will construct and deliver the infrastructure for the sites as well as the residential homes. Certain agreed Enabling Works (such as highways access) will be carried out by the Developer but the Council will make contribution towards the cost by way of Land Release grant funding;
- 6        the terms of the financial expectations are to be settled during Dialogue. However, the Council expects a capital receipt together with a profit linked overage; and
- 7        the Developer is invited to contribute to the Council's legal and professional costs for the scheme.

### Drafting notes for the Council and points outstanding.

- 1        Word search "Initial Development Works".
- 2        Overage provisions to be drafted in.
- 3        Add contract management provisions.
- 4        Deferred Payment mechanism?
- 4.1     Security for overage.
- 5        CSM site assembly – joint site.
- 6        Local labour, training and apprenticeship provisions.

## Drafting reminders

- Check "submission plans" Detailed Scheme [Procuring]
- Design & quality standards
- Skills & employment provisions
- Marketing plan
- Council's step in?
- Public procurement ineffective events
- Parties' costs
- Move fossils section to property development section

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# Development and Regeneration Agreement

dated

## Parties

- (1) **Torbay Council** of [ ] (the **Council**);
- (2) **[Developer]** (registration no. [ ]) whose registered office is at [ ] (the **Developer**); and
- (3) **[Guarantor]** (registration no. [ ]) whose registered office is at [ ] (the **Guarantor**).

## Introduction

- (A) By an advertisement dated [1 October 2019] Reference Number [ ] in the supplement to the Official Journal of the European Union, the Council sought proposals for the development and regeneration of the identified sites at Collaton Saint Mary and Preston Down Road, Torbay and associated land and property.
- (B) Following a procurement process the Council has selected the Developer and the Council, the Developer and Guarantor have agreed to enter into this Agreement to set out the terms upon which the redevelopment and regeneration will be undertaken.
- (C) The Council has agreed to enter into this Agreement pursuant to its powers contained in Section 1 of the Localism Act 2011, and section 111, 120 and 123 of the Local Government Act 1972, and [ ] and all other enabling powers.
- (D) The Council's Cabinet resolved to approve this transaction on [ ].
- (E) The Developer's Board resolved to approve this transaction on [ ].
- (F) [The Guarantor has agreed to enter into this Agreement to guarantee the performance of the obligation of the Developer.]

## Operative clauses

### 1 Definitions

In this Agreement the following words and expressions have the meaning specified except when expressly stated to the contrary.

**1990 Act** the Town and Country Planning Act 1990;

**1994 Act** the Law of Property (Miscellaneous Provisions) Act 1994;

**[Acquisition in relation to an Interest or a New Right:**

- (a) the transfer, conveyance, assignment, assurance or other vesting in the Council or the Developer of an Interest or the termination of an Interest which falls within paragraphs 1(b) or 1(c) of the definition of an Interest;  
or



(b) the grant of a New Right;

and the terms **Acquire** or **Acquired** will be construed accordingly;] *[NB: land to be purchased as part of the ecology solution at CSM]*

**Adoptable Common Services** means all Common Services which are intended to become adopted or maintainable at the public expense or by any public or statutory authority;

**Affordable Dwelling** means any Dwelling provided at an asking price or rent lower than the prevailing market prices or market rents in the county of Cornwall and to be made available to Qualifying Occupiers in accordance with the terms of any planning agreement pursuant to section 106 Town and Country Planning Act 1990 (as amended);

**Affordable Housing** means Affordable Dwellings to be constructed as part of the Development (taking due account of the Affordable Housing Mix) and comprising 25% (or such other higher figure as may be required or imposed by the Local Planning Authority in any Planning Agreement) of the aggregate of all Dwellings forming part of the Development and which are to be disposed of to Qualifying Occupiers and/or persons or households in housing need (and including those on moderate incomes) all in line with or as may be varied by the Affordable Housing Strategy;

**Affordable Housing Mix** means the requirement by the Local Planning Authority that the Development shall be so configured so that there shall be no more than a specified number of contiguous Affordable Dwellings;

**Affordable Housing Scheme** means the Affordable Housing Scheme as defined in the Planning Agreements;

**Affordable Housing Strategy** means the strategy published by the Local Planning Authority (and which is current at the date of the Outline Permission and which the Developer is required to comply with pursuant to the terms of the planning agreement entered into pursuant to section 106 Town and Country Planning Act 1990 (as amended)) for the inclusion of Affordable Housing and which relates to the Development

**Agreed Working Practices** means the working practices set out in Schedule 9;

**Building** any building or other structure to be constructed within a Phase as part of the Development;

**Building Contract** each building contract to be entered into between the Developer and the Building Contractor in accordance with [Schedule 6] for the carrying out of the Development;

**Building Contractor** such reputable building contractor or contractors as may from time to time be appointed by the Developer in accordance with Schedule 6 to carry out the Development;

**CDM Regulations** the Construction (Design and Management) Regulations 2015;

**Certificate of Making Good Defects** the certificate or statement issued by the Developer's Representative certifying or otherwise confirming the making good of all defects in accordance with the provisions of the Building Contract;

**Certificate of Practical Completion** the certificate or statement issued by the Developer's Representative certifying or otherwise confirming Practical Completion;

**Challenge** any challenge under Part XII of the Town and Country Planning Act 1990 or any re-enactment thereof or any judicial review application or other challenge pursuant to Order 53 of the Rules of the Supreme Court and/or any application pursuant to the Human Rights Act 1998 and/or any application pursuant to section 97 of the Town and Country Planning Act 1990;

**CML Certificate** means a certificate in a form which complies with the requirements for completion of a mortgage advance in accordance with the requirements of the Council of Mortgage Lenders and may be a certificate issued by the NHBC, Local Authority Building Control or other like authorised body regularly issuing such certificates within the housebuilding industry;

**CML Disclosure of Incentives Form** means the Disclosure of Incentives Form prepared by the Developer in respect of a sale of a Dwelling in the form available from the CML website <http://www.cml.org.uk/handbook>;

**Common Areas** means:

- (a) those parts of the Property not included in any Dwelling;
- (b) those Highways and Common Services not intended to be adopted as maintainable at public expense;
- (c) Open Space Land not intended to be transferred by the Council,

and which it is intended shall be transferred to the [Management Company] as shown on the [Approved Plan];

**Common Services** means sewers, drains, channels, pipes, watercourses, gutters, wires, cables, pillars, turrets, amplifiers, poles, soakaways and any other apparatus for the supply, transmission or distribution of water, gas, electricity or telephone, radio or television signals or for the disposal of soil, foul water, rainwater or surface water, which are not to be adopted as maintainable at public expense;

**Considerate Constructors Scheme** means the Code of Considerate Practice promoted by the construction industry a copy of which is to be found on the Considerate Constructors Scheme website;

**Competitive Dialogue** means the procurement used to select the Developer to carry out the Development Works pursuant to Contract Notice [ ] published in the Official Journal of European Union on [1 October 2019];

**[Completion]** actual completion of a [Phase Transfer or Phase Licence] under this Agreement;

**Completion Date** the contractual completion dates for each [Phase Transfer or Phase Licence] in accordance with this Agreement];

**Conditions** the conditions precedent for each Phase set out at Schedule 3;

**Contamination** all or any pollutants or contaminants including any chemical or industrial radioactive dangerous toxic or hazardous substance waste or residue whether in solid semi-solid or liquid form or a gas or vapour;

**Contract Rate** 4% above the annual base lending rate of The Royal Bank of Scotland plc from time to time;

**Council's Minimum Benchmarks** means the Council's minimum benchmarks in respect of an individual scheme of development for employment and skills opportunities and as set out in the Employment and Skills Plan

**Council's Solicitors** Trowers & Hamlins LLP of 10 Colmore Row, Birmingham B3 2QD (Ref. CKP.32998.58.FKC);

**Dataroom** means the dataroom hosted by [JLL] and which is accessible at [ ] from which the Developer has received [ ]

**Defects** any defect in any of the buildings or other structures on the Property, or any part of them, or anything installed in such buildings or structures attributable to:

- (a) defective design;
- (b) defective workmanship or defective materials, plant or machinery used in such construction having regard to good industry practice and to appropriate British standards and codes of practice current at the date of construction of the building or structure;
- (c) the use of materials in the construction of any building or structure which (whether or not defective in themselves) prove to be defective in the use to which they are put in the construction of any such building or structure;
- (d) defective installation of anything in or on any building or structure;
- (e) defective preparation of the site on which the building or structure is constructed; or
- (f) defects brought about by adverse ground conditions or by reason of subsidence, water table change or any other change to ground conditions;

**Detailed Scheme Drawings** plans and drawings as described in [paragraphs 6 and 7 of Schedule 6] as added to, modified or varied from time to time in accordance with the provisions of this Agreement;

**Design and Sustainability Standards** means the minimum design and sustainability standards to be achieved for the Development as set out Schedule [1];

**Design Architect** [ ] or such other reputable firm or company of architects as may be approved in accordance with Schedule 6 and appointed by the Developer for the purposes of the Development;

**Design Data** all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Development, in each case that is used by or on behalf of the developer or its Sub-Contractors in connection with the provision of the Developer's Works or the performance of the Developer's obligations under this Agreement;

**Developer Related Party:**

- (a) an officer, servant or agent of the Developer or any Group Company of the Developer and any officer, servant or agent of such a person;
- (b) any Sub-Contractor of the Developer and any of their officers, servants or agents; and
- (c) any person on or at the Property at the express or implied invitation of the Developer;

**Developer's Bank Account** means [ ]

**Developer's Solicitors** means [ ] of [ ] (Ref means [ ]);

**Developer's Works** the works operations and provision of services to be carried out and performed by the Developer to effect the Development in accordance with the provisions of this Agreement;

**Development** means the development of the Property in accordance with this Agreement including without limitation development of the Property on a phased basis comprising the Minimum Development and [ ] within Phase 1, Phase 2 and Phase 3 (in each case in accordance with the provisions of this Agreement and reference to Development means each and every part of it as the context admits; [**NB: amend as necessary to fully describe the scheme.**]

**Development Brief** means as a minimum the [ ] and any variations thereto as varied by the provisions of this Agreement and their delivery in accordance with the Planning Agreements (including for the avoidance of doubt the Affordable Housing); [**NB: Council to confirm**]

**Development Strategies** means the individual development strategies (where relevant to the Development) set out in Schedule 10 to be prepared by the Developer and Approved by the Council;

**Dwelling** means any house, bungalow, flat, maisonette or other single unit of residential accommodation to be constructed on the Property together with any land forming its curtilage and any other appurtenant structures;

**Enabling Works** means [ ] [**NB: means the works to be carried out by the Developer as part of the Development Works and described at Schedule 9, the cost of which will be met by the Council pursuant to the Land Release Contribution**];

**Environmental Information Regulations** the Environmental Information Regulations 2004 together with any guidance of codes of practice issued by the Information Commissioner (as defined in the regulations) or relevant Government department in relation to such regulations;

**Event of Default** has the meaning ascribed to that term in clause 18.1;

**Event of Insolvency** has the meaning ascribed in clause 18.4;

**Final Scheme Layout Plan** the plan approved by the Council pursuant to Schedule 6 paragraph 5;

**FOIA** the Freedom of Information Act 2000 and any subordinate legislation (as defined in section 84 of the FOIA) made under the FOIA from time to time together with any guidance or codes of practice issued by the Information Commissioner (as defined in the regulations) or relevant Government department in relation to the FOIA;

**FOIA Fees Regulations** the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004;

**Information** has the meaning ascribed to it by section 84 of the FOIA;

**Intellectual Property Rights** any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached to them which are created, brought into existence, acquired, used or intended to be used by the Developer or any Developer Related Party for the purposes of carrying out the Developer's Works or otherwise in connection with the Development or for the purposes of this Agreement;

**[Interest** means:

- (a) an estate in fee simple absolute in possession;
- (b) any subsisting term of years absolute; and
- (c) such other interests, charges, encumbrances and restrictions of whatsoever nature which are subsisting and capable of exercise or enforcement;

which will or may materially interfere with or affect the Developer's ability to carry out or commence or continue with the Development or which will or may prevent the obtaining of vacant possession and beneficial use and occupation of the Property;]

**Key Stages** means [ ]; **[NB: This is essentially the programmes linked to the delivery phases;]**

**[NB bidders to propose as part of their submissions and to be discussed in dialogue. Link to definition of Phases.]**

**[Key Stage Dates** the final date by which each Key Stage should be achieved, as specified in respect of each Key Stage at the definition of Key Stages in this clause 1 (or such later dates as may be agreed in writing between the parties);]

**[NB bidders to propose as part of their submissions and to be discussed in dialogue]**

**Land Release Fund** means the funding pool provided to the Council as part of the One Public Estate programme and which was awarded to the Council on [ ];

**Land Release Account** means a bank account held and operated by the Council specifically for the operation of the Land Release Fund;

**Land Release Contribution** means [ ]; **[Council to confirm the amount to be released to the Developer ]**

**Licence Fee** the licence fee for each Phase Licence specified in the Phase Licence and payable on the dates and in the manner specified in the Phase Licence;

**[NB: The licence will be used only for pre-condition site investigations. Will the Council want to charge a fee.]]**

**Long Stop Date** means [ ]; **[NB: the timing for satisfying the Conditions and also for completing the Development will be agreed in dialogue.]**

**Master Planning Architect** [ ] or such other reputable firm or company of architects as may be approved in accordance with Schedule 6 and appointed by the Developer for the Development;

**Minimum Development** means a comprehensive development of the Property which comprises as a minimum of [ ] Dwellings or such lesser number as may be agreed between the parties acting reasonably;

**Model Appraisal** the form of appraisal annexed to this Agreement;

**Modern Slavery Legislation** means the legislation referred to in section 54 Modern Slavery Act 2015;

**[New Right** any right which is necessary to enable the Development to proceed as identified by the Developer acting reasonably and in good faith and notified in writing by the Developer to the Council promptly following such identification;] **[NB: link to the eco solution]**

**Onerous Conditions** bears the meaning ascribed in paragraph 9.2 of Schedule 4;

**Open Space Land** means that part of the Property being the open spaces, play areas, amenity areas and landscaping areas identified as such in the Approved Plans for general public use in accordance with the Planning Agreement;

**Overriding interests** means interests that override first registration (as defined in schedule 1 to the Land Registration Act 2002), interests that override registered dispositions (as defined in schedule 3 to the Land Registration Act 2002) or interests the

status of which is preserved as overriding by schedule 12 to the Land Registration Act 2002;

**Phase** each phase of the Development comprising [Phase 1], [Phase 2] and [Phase 3];

**Phase Commencement Notice** means a notice prepared by the Developer stating the number of Units to be constructed upon the relevant Phase and the commencement and anticipated completion date for the construction of that Phase;

**Phase Completion Notice** means a notice prepared by the Developer pursuant to clause [11.2] stating the number of Units that have been constructed upon the relevant Phase and the completion date of all the Units within the relevant Phase;

**Phase Conditions Satisfaction Date** five Working Days following the date on which all of the Phase Conditions for the relevant Phase have been satisfied [or waived] in accordance with this Agreement;

**Phase Licence** a licence in the form annexed at Annex [ ] for each Phase;

**Phase Quality Completion Notice** means a notice prepared by the Council or the Council's Representative confirming that it is content with the quality of construction of the Units comprised within the Threshold Figure on the relevant Phase;

**Phase Rectification Notice** means a notice prepared by the Council or the Council's surveyor detailing the works that the Developer must undertake or procure to specified Units to ensure that they are constructed to the standards required pursuant to the terms of this Agreement;

**Phase Transfer** [ ]; [NB: *transfer to be drafted by Council's in-house legal team*]

**Phase 1 Completion Date** means 20 working days or such shorter period as the Developer and the Council may agree following the date of satisfaction of the Conditions;

**Phase 2 Completion Date** means 20 working days or such shorter period as the Developer and the Council may agree following the date of satisfaction of the Conditions;

**Phase 3 Completion Date** means 20 working days or such shorter period as the Developer and the Council may agree following the date of satisfaction of the Conditions;

**Phase 1 Transfer** means the transfer of Phase 1 in the form of the draft attached at Annexure 2 of this Agreement with such amendments as may be agreed between the parties; [NB: *confirm mechanism for Phase 2 release and Phase 1 released once Conditions are satisfied*]

**Phase 2 Transfer** means the transfer of Phase 1 in the form of the draft attached at Annexure 2 of this Agreement with such amendments as may be agreed between the parties;

**Phase 3 Transfer** means the transfer of Phase 1 in the form of the draft attached at Annexure 2 of this Agreement with such amendments as may be agreed between the parties;



**Phase 1 Purchase Price** means the sum of £[ ];

**Phase 2 Purchase Price** means the sum of £[ ];

**Phase 3 Purchase Price** means the sum of £[ ];

**Phase 1, Phase 2 and Phase 3** mean [ ] as illustrated on the Phasing Plan[s];

**Phasing Plans** the plan/s at Annex [ ] showing and identifying each Phase;

**Planning Agreement** an agreement or planning obligation made under Section 18 of the Public Health Act 1936, Section 38 and Section 278 of the Highways Act 1980, Section 33 of the Local Government (Miscellaneous Provisions) Act 1982, Section 106 of the Town and Country Planning Act 1990, Section 104 of the Water Industry Act 1991 or an agreement with any competent authority or body relating to other services;

**Planning Application** the application to be submitted by the Developer to the local planning authority for the grant of the Planning Permission in accordance with this Agreement and applications for conservation area consents (if necessary) for the Developer's Works;

**Planning Counsel** means a specialist planning counsel who has been working continuously as a planning barrister for at least ten years since call as agreed by the Council and the Developer (acting reasonably) or in default of agreement by the Chairman (or other senior officer) of the Bar Council for England and Wales;

**Planning Performance Agreement** means [ ]; *[NB: will be removed if the Planning team can't provide in advance of the negotiations.]*

**Planning Permission** the detailed planning permission and other approvals and permissions and any listed building consents and conservation area consents (if necessary) for the Developer's Works issued in accordance with the provisions of Schedule 4 and any revised planning consent issued in place of that consent in accordance with the provisions of this Agreement;

**Planning Refusal** a refusal of planning permission applied for under this Agreement (including a deemed refusal arising under section 78(2) of the 1990 Act) or the grant of a Planning Permission subject to an Onerous Condition;

**Practical Completion** practical completion of the whole of the Development in accordance with the Building Contract having occurred under the Building Contract and references to the Practical Completion Date are to the date on which the certificate that the Development is practically complete is issued under the Building Contract; *[NB further discussion required regarding Phase completions and Sectional Completions.]*

**Preliminary Works** means [ ] *[NB: to be agreed – any preliminary works or surveys etc permitted by a Phase Licence prior to the Unconditional Date.]*

**Professional Team** the Master Planning Architect, the Design Architect, the Structural Engineer and [ ]; *[NB: bidders to confirm]*

**Project Data**



- (a) all Design Data; and
- (b) any other materials, documents or data acquired or brought into existence or used in relation to the Developer's Works or this Agreement;

in each case that is used by or on behalf of the Developer or its Sub-Contractors in connection with the provision of the Developer's Works or the performance of the Developer's obligations under this Agreement;

**Project Expenditure** has the meaning ascribed to it at paragraph 1 of Part 2 of Schedule 7;

**Project Expenses** has the meaning ascribed to it at paragraph 2 of Part 2 of Schedule 7;

**Projected Developer's Return** the projected return to the Developer expressed as a percentage of Project Expenses as at the last day of the Expenditure Period (as defined in Schedule 7); ***[NB: the Council invites the bidders proposals for any deferred payment or overage as part of the commercial limb of the dialogue.]***

**Project Steering Group** means a joint project steering group for the Development formed by the Council and the Developer to ensure collaboration and good governance of the Development;

**Property** the property known as (1) Collaton Saint Mary comprising approximately [ ] [acres] shown edged red on the Master Plan annexed at Annexure [ ]; and (2) Preston Down Road comprising approximately [ ] [acres] shown edged red on the Master Plan annexed at Annexure [ ]; ***[NB there will be a separate agreement for each site but drafted on similar terms.]***

**Property Conditions** the Standard Commercial Property Conditions [(Second Edition)];

**Qualifying Occupiers** mean such persons nominated by the Local Planning Authority and identified as a class of persons within the Affordable Housing Strategy (or part of any Planning Agreement) whose incomes are insufficient to enable them to afford adequate housing locally on the open market and (if there is in place any eligibility criteria for the occupation of the Affordable Dwellings issued by the Local Planning Authority) persons who at the date of their first occupation of an Affordable Dwelling satisfy such criteria;

**Relevant Consents** permissions, consents, approvals, licences, certificates and permits in legally effectual form necessary to commence and complete the Development and to use and enjoy it in the manner intended by the Developer and the Council including (but without limitation):

- (a) building regulations consents and by-law approval;
- (b) listed building consents;
- (c) the requirements of all competent authorities regulating either or both of the Development and the use of the Property;
- (d) any consents required to dispose of public open space;

- (e) consents of all parties having interests or rights in or over the Property who (in the absence of such consent) by the lawful exercise of them could prevent or impede the carrying out of or progress of the Development or its use and enjoyment as intended by the Developer and the Council;

but excluding the grant of planning permission;

**Relevant Event** any of:

- (a) any event in respect of which an extension of time is properly given to the Building Contractor under the terms of the Building Contract to the extent that it is not caused by a breach by the Developer of its obligations under the Building Contract;
- (b) any other cause or circumstances adversely affecting or delaying the performance by the Developer of the terms and provisions of this Agreement and which is beyond the reasonable control of the Developer,

to the extent that such cause or circumstance is not as a result of an act or default of the Developer and provided that the Developer has taken all reasonable and proper steps available to it to mitigate the effect of such cause or circumstance;

**Request for Information** has the meaning ascribed to it in the FOIA or the Environmental Information Regulations (as applicable);

**[Road Orders** means:

- (a) orders made by the Secretary of State under section 247 of the 1990 Act for the stopping up of the roads as required by the Developer in accordance with this Agreement to enable it to carry out the Developer's Works;
- (b) orders made by the local highway authority under section 1 of the Road Traffic Regulation Act 1984 as required by the Developer in accordance with this Agreement;
- (c) any other traffic regulation orders or consents or orders required to allow the diversion, closure, stopping up or other alterations of highways, footpaths, watercourses and/or culverts necessary for the implementation of the Development;]

**Scheme Layout Plan** the plan illustrating the proposed layout of the Development entitled Scheme Layout Plan annexed to this Agreement at Annex [            ];

**Servicing Works** comprise:

- (a) the construction of the roads, footpaths, service media, open space and landscaping areas, surface water retention facilities and all other items of infrastructure serving the Development whether within or outside Phase 1 and the Property; and

- (b) all payments and contributions payable in respect of infrastructure serving the Development pursuant to the Planning Agreement;

**Sewers** mean adoptable foul and surface water sewers;

**Sewers Technical Approval** means written approval by the competent water authority of the Developer's detailed proposals for adoptable foul and surface water sewers within the Development;

**Site Conditions** means the conditions of the Property including but not limited to climatic, hydrological, hydrogeological, ecological, environmental, geotechnical and archaeological conditions;

**Strategy Documents** means the documents annexed at Annex [ ];

**Structural Engineer** means [ ] or such other reputable firm or company of structural engineers as may be appointed by the Developer for the Development from time to time;

**Sub-Contractor** means each of the Building Contractor, [ ] or any other person engaged by the Developer from time to time permitted by this Agreement to procure the provision of the Developer's Works;

**Submission Plans** means plans to be prepared by the Developer and submitted to the Council in accordance with paragraph 6 of Schedule 4; **[NB: i.e the planning submission plans]**

**[Surveyor means [ ]:]**

**Target Programme** means the indicative programme agreed between the Council and the Developer to achieve satisfaction of the Key Stages, the Conditions and to implement and carry out the Developer's Works and complete the Development, a copy of which is annexed, as updated from time to time in accordance with this Agreement;

**Tender Submission** means the Developer's proposals for the Development submitted during the Competitive Dialogue and accepted by the Council the details of which are appended at Annexure [ ];

**[Updated Viability Appraisal means the updated viability appraisal to be submitted by the Developer in accordance with paragraph [3] of Schedule 3;] [NB: market slowdown and pre-phase release viability to be discussed as part of the dialogue]**

**VAT** means Value Added Tax as charged in accordance with the provisions of the Value Added Tax Act 1994 (**VATA**) and regulations made thereunder (or any amendment or re-enactment thereof) or any equivalent tax or duty which may be imposed in substitution therefor or in addition thereto at the rate application from time to time; **[NB: tax option status to be confirmed]**

**[Viability Appraisal means the appraisal to be submitted by the Developer in accordance with paragraph [3] of Schedule 3;] and**

**Working Day** any day which is not a Saturday, Sunday or a statutory or public holiday.

## 2 Interpretation

- 2.1 Where there are two or more persons included in the expression the Developer or the Guarantor covenants and obligations entered into by the Developer or the Guarantor respectively will be deemed to be entered into by such persons jointly and severally.
- 2.2 Where there are two or more persons included in the expression the Developer or the Guarantor an event or something will be deemed to have occurred if it happens to any one of them for the purposes of this Agreement.
- 2.3 Any covenant by the Developer or the Guarantor not to do or omit any act or thing will be taken to include a covenant not to suffer or permit the doing or omission of that act or thing.
- 2.4 The Developer will for the purposes of this Agreement be deemed to have such knowledge in respect of the Development as is held (or ought reasonably to be held) by a Developer Related Party.
- 2.5 Where there are provisions in this Agreement allowing waiver of a term or provision by any party, no term or provision is to be considered or waived unless such waiver is given in writing and any such waiver will not be a waiver of a part or future default or breach nor will it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.
- 2.6 For the purposes of this Agreement, two companies are members of the same group if one of them is the subsidiary of the other, or both are subsidiaries of a third company, subsidiary having the meaning given to it in section 1159 of the Companies Act 2006 and Group Company will be construed accordingly.
- 2.7 References to writing or written include faxes but not e-mail.
- 2.8 The expression the Guarantor includes any person who has guaranteed the obligations of the Developer under this Agreement and his personal representatives.
- 2.9 A person includes a corporate or unincorporated body.
- 2.10 Unless otherwise specified, a reference to a particular statute or other law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it and all orders, notices, codes of practice, guidance, standards that have the force of law, directions, impositions and requirements of any competent authority made under it.
- 2.11 A reference to statute or other laws in general is to all local, national and directly applicable supra-national laws in force for the time being, taking account of any amendment, extension, application or re-enactment and includes any subordinate laws for the time being in force made under them and all orders, notices, codes of practice, guidance, standards that have the force of law, directions, impositions and requirements of any competent authority made under them.

- 2.12 Except where a contrary intention appears, a reference to a clause or schedule is a reference to a clause of or schedule to this Agreement and a reference in a schedule to a paragraph is to a paragraph in that schedule.
- 2.13 Clause, schedule and paragraph headings and the contents pages do not affect the interpretation of this Agreement.
- 2.14 The singular includes the plural and vice versa.
- 2.15 In the event of inconsistency between the provisions of the body of this Agreement and the schedules to this Agreement the body of this Agreement will take precedence.
- 2.16 Subject to the provisions of this Agreement, the Developer will be responsible for the acts and omissions of the Developer Related Parties as if they were the acts and omissions of the Developer.
- 2.17 Neither the giving of any approval, consent, examination, acknowledgement, knowledge of the terms of the agreement or document nor the review of any document or course of action by or on behalf of the Council nor the failure of the same, will relieve the Developer of any of its obligations or of any duty which it may have hereunder to ensure the correctness, accuracy or suitability of the matter or thing which is the subject of the approval, consent, examination, acknowledgement or knowledge.
- 2.18 References to a public organisation will be deemed to include a reference to any successor to such public organisation or any organisation or entity which has taken over either or both the functions and responsibilities of such public organisation and references to any such organisation will include its successors and assigns.

### 3 Conditions

#### 3.1 Covenant to satisfy conditions

- 3.1.1 This Agreement is conditional upon the satisfaction of the Conditions except for clauses [ ] inclusive and Schedule [ ] which have immediate effect. **[NB: to be amended in dialogue to reflect any conditions linked to the phasing of the Development. It is presumed that the Developer will obtain planning consent for the whole of the site and then deliver in phases with land release linked to those phases.]**
- 3.1.2 The Developer will use best endeavours to procure satisfaction of the Conditions as soon as reasonably practicable.
- 3.1.3 The Council (as landowner) will provide to the Developer such reasonable assistance as the Developer may reasonably require to satisfy the Conditions provided that this clause will not fetter the Council in the exercise of its statutory powers or duties and this obligation shall not apply to the Conditions and other matters listed at paragraphs [ ] of Schedule 3.

#### 3.2 Duration, Extension and Termination if conditions are not satisfied

[ ] **[NB: the Council expects the Conditions to be satisfied within 1 one year and the development to run for a duration of five years with option to extend by**

***agreement should there be a need to reflect market conditions. This is to be discussed in dialogue.]***

#### **4 Phase Licences and Phase Transfers**

- 4.1 In consideration of the payments referred to in the relevant Phase Licence to be paid to the Council (including the Licence Fee) the Council will grant and the Developer will accept and the Guarantor will guarantee each Phase Licence on the terms of this Agreement and in accordance with Schedule 5. ***[NB: Licences for preliminary access before land transfer.]***
- 4.2 Subject to satisfaction of the **Conditions** for the relevant Phase and in consideration of the premiums and other payments referred to in the Phase Transfers the Council will grant and the Developer will accept and the Guarantor will guarantee each Phase Transfer on the terms of this Agreement and in accordance with Schedule 5.

#### **5 [Strategy Documents]**

- 5.1 The Developer will update each of the Strategy Documents as the design and other aspects of the Development are developed and will supply such updates to the Council for approval (such approval not to be unreasonably withheld or delayed provided that such updated Strategy Documents are consistent with the other provisions of this Agreement).
- 5.2 Once approved by the Council the updated versions of the Strategy Documents will replace the previous versions for the purposes of this Agreement.
- 5.3 It is intended that the strategies as described in the Strategy Documents will be guiding principles unless agreed otherwise between the parties and referenced within the relevant Strategy Document.]

***[NB: Bidders should indicate which of their submission documents are the proposed strategy for delivering the Development]***

#### **6 Target Programme**

- 6.1 The Council and the Developer agree that the Target Programme sets out the target dates by which the parties intend the actions specified in the Target Programme to be undertaken to enable the Key Stages to be achieved, the Conditions to be satisfied and the Developer's Works to be delivered by the dates stated in the Target Programme.
- 6.2 The Developer agrees to:
- 6.2.1 keep the Target Programme under review,
  - 6.2.2 update the Target Programme subject to the Council's approval as often as the Developer and Council reasonably agree is necessary, and
  - 6.2.3 issue the revised Target Programme promptly to the Council following any such update.
- 6.3 Unless otherwise agreed by the Council at its absolute discretion the Developer will not be entitled to extend the date for delivery of any Key Stage beyond the relevant Key Stage

Date and shall not be entitled to extend the target Practical Completion Date stated in the Target Programme.

## **7 Termination if Key Stages are not achieved**

- 7.1 If a Key Stage is not achieved by the relevant Key Stage Date, either party may at any time after the relevant Key Stage Date occurs, until the relevant Key Stage is achieved, terminate this Agreement by service of written notice to that effect upon the other party.
- 7.2 On service of a valid notice pursuant to clause 7.1, this Agreement will forthwith determine and cease to have effect but without prejudice to any claim of the Council or the Developer against the other (or to any claim by the Council against the Guarantor) in respect of any antecedent breach of an obligation under this Agreement.

## **8 Council's Option to Retain**

***[NB: drafting to be developed as part of dialogue – linked to the provision of any non-residential properties such as community building. Affordable Housing covered elsewhere].***

- 8.1 [The Council shall have the option to retain any Building constructed on [ ] of the Development such option to be on the terms and conditions set out in Schedule [ ].
- 8.2 The Developer and the Council agree to comply with the provisions of Schedule [ ].

## **Financial Provisions**

### **9 Land Price and Overage**

- 9.1 [ ] ***[NB: waiting for input from JLL. Details of the land price consideration and any deferred payments will be placed here.***
- 9.2 [ ] ***Overage will be invited with details to be concluded in dialogue]***
- 9.3 [ ] ***Minimum price and market slowdown or price reduction mechanisms to be discussed in dialogue]***
- 9.4 [ ] ***[NB: drafting to be developed for sales/revenue overage during dialogue. A separate Overage Deed may be offered to bidders during dialogue depending on the Council's review of the commercial proposals].***

### **10 Value Added Tax**

- 10.1 All payments to be made by the Developer to the Council under this Agreement are exclusive of any VAT chargeable on them and such VAT will be added to the amount of those payments and paid in addition to them upon production of a proper VAT invoice (within the meaning of Schedule 11 Paragraph 2 VATA).
- 10.2 The parties will liaise to secure a consistent and efficient analysis and application of the VAT rules to the transactions contemplated by this Agreement. In particular, where a supply is one of two or more mutual supplies between the parties the parties will agree the values to be invoiced to each other in respect of those mutual supplies and will ensure that invoices are issued by each party to the other at, or as near as possible to, the same time

and in any event that each party's related input and output tax fall in the same VAT accounting period.

## **11 Land Release Funding**

***[NB: note this a Council run account and not a traditional escrow account.]***

### **11.1 Land Release Account**

On the date of this Agreement the Council shall lodge the Land Release Contribution into the Land Release Account and the following provisions shall apply to that account:

11.1.1 the Council shall deal with the monies standing to the credit of the Land Release Account as contemplated in this clause 11 (and where relevant the other provisions of this Agreement) and not otherwise;

11.1.2 no monies shall be released from the Land Release Account, other than:

- (a) as contemplated in this clause 11 (or the other relevant provisions of this Agreement); or
- (b) pursuant to a court order; or
- (c) pursuant to an award of an expert pursuant to clause [ ]; or
- (d) with the prior written consent of the Council.

11.1.3 The Council shall each issue promptly such directions to its authorised officer and such consent and approval as are contemplated in this clause 11.

11.2 The Land Release Contribution shall be paid to the Developer from the Land Release Account as follows:

11.2.1 upon the production from time to time by the Developer to the Council of a copy of the Building Contractor's or relevant member of the Professional Team's invoice in respect of the relevant item of the Enabling Works the relevant amount shall be paid promptly to the Developer's Bank Account by the Council way of telegraphic transfer from the monies standing to the credit of the Land Release Account (insofar as not exhausted pursuant to the operation of the provisions of this clause 11)

11.2.2 following the payment to Developer's Bank Account from the Land Release Account of all sums due to the Developer in respect of the Enabling Works any sum remaining in the Land Release Account shall be repaid to the Council; and

11.2.3 if the cost of the Enabling Works exceeds the Land Release Contribution the Council shall not be responsible for such excess.

## **12 Construction Industry Scheme**

12.1 The Council has informed the Developer prior to the date of this Agreement as to whether or not it is at the date of this Agreement a CIS Contractor under the Construction Industry Scheme and:



- 12.1.1 if it is a CIS Contractor clauses 12.3 to 12.10 shall apply; and
- 12.1.2 if it is not a CIS Contractor clauses 12.3 to 12.10 shall not apply.
- 12.2 If at any time up to the due date for payment of the Land Release Contribution by the Council under this Agreement the Council becomes a CIS Contractor or ceases to be a CIS Contractor the Council shall so inform the Developer and the provisions of clauses 12.3 to 12.10 shall or shall not apply as the case may be.
- 12.3 It is acknowledged by the Council and the Developer that the Council shall, prior to making any payment of the Land Release Contribution under or pursuant to this Agreement, obtain a Verification.
- 12.4 The Council shall use reasonable endeavours to obtain a Verification and the Developer shall provide the Council with the information referred to in regulation 6(2)(b)(iii) of the CIS Regulations to the extent the Council has not already received such information prior to the date of this Agreement.
- 12.5 Where the Council has obtained or received a Verification or Notification that the Developer is registered under Part 3 Chapter 3 of the Finance Act 2004 for payment under deduction or is not registered under Part 3 Chapter 3 of such Act:
- 12.5.1 at least five Working Days before the date for payment of the Land Release Contribution due under this Agreement the Developer shall give to the Council a statement showing the Direct Cost of Materials to be included in the payment; and
- 12.5.2 the Council shall make the Statutory Deduction from that part of the payment which is not in respect of the Direct Cost of Materials as stated by the Developer pursuant to clause 12.5.1 or (where appropriate) as estimated by the Council pursuant to clause 12.5.3; and
- 12.5.3 where the Developer fails to comply with clause 12.5.1, or where the Council has reasonable grounds to believe that any statement provided pursuant to clause 12.5.1 is incorrect, the Council shall make a fair and reasonable estimate of the Direct Cost of Materials to be included in the payment.
- 12.6 Where the Council has obtained or received a Verification or Notification that the Developer is registered for gross payment under Part 3 Chapter 3 of the Finance Act 2004 the Council shall pay or procure to be paid any amount due to the Developer in respect of the Land Release Contribution without making the Statutory Deduction.
- 12.7 Where the Council has previously obtained a Verification or Notification as referred to in clauses 12.5 or 12.6 and subsequently receives a Notification the Council shall thereupon notify the Developer and thereafter clauses 12.5 or 12.6 shall apply as appropriate.
- 12.8 The Council shall comply with its obligations towards the Developer under regulation 4 of the CIS Regulations and all other obligations under Part 3 Chapter 3 of the Finance Act 2004 and the CIS Regulations.
- 12.9 Where the Council has made an error or omission in calculating the Statutory Deduction it shall correct the error by:

- 12.9.1 where the initial calculation of the Statutory Deduction was excessive, payment to the Developer of the amount of the underpayment within ten Working Days of the date on which the Council becomes aware (or ought reasonably to have become aware) that an error had been made in calculating the Statutory Deduction; or
- 12.9.2 where the initial calculation of the Statutory Deduction was insufficient, further deduction from payments due to the Developer in respect of the Land Release Contribution under this Agreement of the amount of the overpayment (and if there are no such further payments due to the Developer any overpayment by the Council shall be reimbursed by the Developer to the Council within ten Working Days of the Developer receiving a written demand from the Council specifying in reasonable detail the quantum of and explanation for the overpayment) subject only to an instruction from HM Revenue & Customs to the Council not to make such a correction.
- 12.10 The relevant procedures applicable under clause [ ] of this Agreement to the resolution of disputes or differences between the Council and the Developer shall apply to any dispute or difference between the Council and the Developer as to the operation of this clause 12 except where the Finance Act 2004 or the CIS Regulations or any other Act of Parliament or statutory instrument, rule or order made under any Act of Parliament provide for some other method of resolving such dispute or difference.
- 12.11 For the avoidance of doubt, the Council and the Developer hereby acknowledge and agree that:
- 12.11.1 the Council will lodge the Land Release Contribution into the Land Release Account pursuant to clause [ ] in full without any deduction, withholding, or set-off whatsoever; and
- 12.11.2 if the Council is a CIS Contractor, clauses 12.3 to 12.10 shall apply to payments to the Developer from the Land Release Account

### 13 Development Covenants

The Developer and the Council covenant to observe and perform the provisions of Schedules 3 to 6 (inclusive).

## 14 Project Expenditure

**[NB: holding working to be discussed with bidders in relation to the overage mechanism.]**

### 14.1 Developer will pay for Project Expenditure

The Developer will pay for all items of Project Expenditure as those sums fall due.

### 14.2 Building contract retentions

The Developer is not required to pay for any item of Project Expenditure to the extent that it is covered by a proper retention under the Building Contract until the retention is

released and sums covered by a retention will not be an item of Project Expenditure for the purposes of this Agreement until the retention is released.

#### **14.3 Accounting**

14.3.1 The Developer will procure that the Council is given the following as evidence of Project Expenditure:

- (a) a copy of the relevant certificate issued under the Building Contract;
- (b) relevant invoices, vouchers or other information for other items of expenditure; and
- (c) a valid tax invoice for VAT purposes for the payment.

14.3.2 The Developer will provide to the Council at reasonable intervals on request copies of the Developer's accounts and records relating to the Project Expenses to the intent that the Project Expenses will be fair and transparent and on an open book basis.

14.3.3 The Developer will take into account the reasonable representations of the Council in respect of the Project Expenses.

#### **14.4 Disputed sums**

If the Council disagrees with or objects to the amount certified as due under an interim certificate issued under the Building Contract, the Council must state the reasons for objection. Unless the Council (acting reasonably) is satisfied with the Developer's explanation justifying the amount claimed the Developer and the Council will promptly try to resolve the dispute but if they cannot do so then the matter will be referred at the request of either the Developer or the Council for determination pursuant to clause 19;

#### **14.5 Interest on accrued expenditure**

Interest payable by the Developer to the Council under this Agreement is not Project Expenditure.

#### **14.6 Treatment of income receipts by or refunds to Developer**

If the Developer receives any income (with the exception of the sums actually paid to the Council by the Developer), it will be set off against the Project Expenditure so as to reduce the Project Expenditure.

#### **14.7 Accounts**

The Developer will maintain in an online digital accessible accounting format proper accounts of all Project Expenditure supported by proper vouchers and records of expenditure and will give a copy of all relevant information, cost reports, budgets estimates and accounts to the Council regularly and otherwise when reasonably requested to do so by the Council.

#### **14.8 Project Account**

The Council and the Developer agree that the provisions of Schedule 8 will apply.

### **15 Developer's Records**

#### **15.1 Records and open book accounting**

The Developer will (and will procure that each Sub-Contractor will) at all times:

15.1.1 maintain a full record of particulars of the Project Expenses and the Receipts;

15.1.2 upon request by the Council, provide a written summary of any of the costs referred to in clause 15.1.1, including details of any funds held by the Developer specifically to cover such costs, in such form and detail as the Council may reasonably require to enable the Developer to monitor the performance by the Developer of its obligations under this Agreement; and

15.1.3 provide such facilities as the Council may reasonably require for its representatives to visit any place where the records are held and examine the records maintained under this clause.

#### **15.2 Books of account**

Compliance with clause 15.1 will require the Developer to keep (and where appropriate to procure that each Sub-Contractor will keep) books of account in accordance with best accountancy practices with respect to this Agreement, showing in detail:

15.2.1 administrative overheads;

15.2.2 payments to and by Sub-Contractors;

15.2.3 capital and revenue expenditure; and

15.2.4 such other items as the Council may reasonably require from time to time to conduct costs audits for verification of cost expenditure or estimated expenditure, for the purpose of this Agreement,

and the Developer will have (and procure that its Sub-Contractors will have) the books of account evidencing the items listed in clauses 15.2.1 to 15.2.4 inclusive available for inspection by the Council (and its advisers) upon reasonable notice and will promptly present a written report of these to the Council as and when requested from time to time.

#### **15.3 Maintenance of records**

15.3.1 The Developer will maintain (or procure the maintenance of) detailed records relating to the performance of the Developer's Works in each case in accordance with good industry practice and any applicable legislation.

15.3.2 Without prejudice to clause 15.3.1 the Developer will procure that the following are maintained:

- (a) a full record of all incidents relating to health, safety and security which occur during the term of this Agreement; and
- (b) full records of all maintenance procedures carried out during the term of this Agreement,

and the Developer will have these items available for inspection by the Council and its advisers upon reasonable notice and will present a report of them to the Council as and when requested from time to time.

#### 15.4 Auditor

The Developer will permit all records referred to in this clause 15 to be examined and copied from time to time by the Council's auditor whether internal or external and their representatives and other representatives of the Council who reasonably require access to the same.

#### 15.5 Retention

The records referred to in this clause 15 will be retained for a period of at least ten years after the Developer's obligations under this Agreement have come to an end.

#### 15.6 Termination or expiry

Upon termination or expiry of this Agreement and in the event that the Council wishes to enter into another agreement for the operation and management of a project the same as or similar to the Development the Developer will (and will use all reasonable endeavours to ensure that its Sub-Contractors will) comply with all reasonable requests of the Council to provide information relating to the Developer's costs of operating and maintaining the Development.

#### 15.7 Financing information

The Developer will:

15.7.1 provide to the Council copies of its annual report and accounts within three days of publication; and

15.7.2 use all reasonable endeavours to assist the Council unless agreed in writing in its preparation of any report which the Council is required to prepare from time to time in respect of the Property or the Development.

#### 16 Sale of the Development

16.1 [ ] ***[NB: Developer's proposals for the market sale units and affordable sales can go here once the commercial deal is agreed. Do be discussed in dialogue. ]***

16.2 [ ] ***[NB: note that the Affordable Units will be purchased either by the Council's Housing Company, Torvista Homes for specified sums under a turnkey arrangement. If at the time of transfer Torvista is unable to purchase the Affordable Units either the Council will purchase them directly or procure the purchase by another registered provider. Details to be discussed in dialogue. ]***

**17 Developer's indemnity**

The Developer will be responsible for and will release and indemnify the Council on demand from and against all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services) proceedings, demands and charges whether arising under statute, contract or at common law arising from:

17.1 death or personal injury;

17.2 loss of or damage to property including property belonging to the Council or for which it is responsible; and

17.3 third party actions, claims or demands brought against the Council,

which may arise out of, or in consequence of, the design, construction, operation or maintenance of the Property or the performance or non-performance by the Developer of its obligations under this Agreement or the presence on the Council's property of the Developer or any Developer Related Party.

**18 Developer's default**

**18.1 Events of default**

For the purposes of this clause 18 an Event of Default occurs if:

18.1.1 the Developer has failed to perform its obligations in this Agreement in any material respect which:

(a) is not capable of remedy; or

(b) if the breach is capable of remedy it has not been remedied after receipt of notice from the Council specifying the particular breach complained of requiring the Developer to remedy the breach and allowing reasonable time to the Developer to do so; or

18.1.2 the Developer or the Guarantor or either being more than one person any one of them becoming Insolvent or suffering Insolvency Proceedings;

18.1.3 either the carrying out of the Developer's Works is wholly or substantially suspended or the Developer's Works are otherwise not proceeded with regularly and diligently, and in either case the default continues for or is not remedied within ten (10) Working Days after service on the Developer by the Council of a notice specifying the default and invoking the provisions of this clause;

**18.2 Other remedies unaffected**

Nothing in this clause 18 affects any other remedy available to the Council as a result of the occurrence of any Event of Default.

### 18.3 Termination and funder's step-in rights

- 18.3.1 Subject to the provisions of clause 18.3.2, on the occurrence of an Event of Default the Council may, in addition to any other rights and remedies it may have, rescind this Agreement by giving notice to the Developer to that effect (a **Termination Notice**) in which case this Agreement will terminate with immediate effect but without prejudice to any claim in respect of any antecedent breach.
- 18.3.2 If the Developer has charged the benefit of this Agreement in accordance with clause 40.2 and has notified the Council of such charge and provided details of the chargee (the **Funder**), the Council will serve notice on the Funder specifying the applicable Events of Default (the **Funder's Notice**) and if the Funder within four weeks of service of the Funder's Notice either:
- (a) serves notice on the Council confirming that the Funder will perform the Developer's or the Guarantor's obligations under this Agreement and provides to the Council a deed of covenant binding the Funder in which the Funder covenants to assume and perform all such obligations and to remedy all outstanding breaches of obligations under this Agreement, such deed of covenant to be in a form approved by the Council (such approval not to be unreasonably withheld or delayed); or
  - (b) serves notice on the Council nominating a prospective assignee of the Developer's benefit of this Agreement for the Council's approval (such approval not to be unreasonably withheld or delayed where the Council reasonably considers that the prospective assignee is of sufficient financial strength to perform the Developer's obligations under this Agreement) and, in the event of such approval by the Council, procures within two weeks from the date of such approval a deed of covenant for the benefit of the Council a deed of covenant binding such assignee in which the assignee covenants to assume and perform all such obligations and to remedy all outstanding breaches of obligations under this Agreement, such deed of covenant to be in a form approved by the Council (such approval not to be unreasonably withheld or delayed) and provides a certified copy of the deed effecting the assignment,

then the Council will not serve a Termination Notice in respect of the applicable Events of Default referred to in its Funder's Notice provided that such Events of Default are remedied as soon as reasonably practicable thereafter and in any event within six months of the date of the Funder's Notice.

### 18.4 Meaning of Event of Insolvency

#### 18.4.1 Meaning of *Insolvent*

In this clause 18.4 in relation to any person *Insolvent* means any of:

- (a) being unable or admitting inability to pay debts as they fall due;
- (b) suspending payments of any debts;

- (c) negotiating with any creditors about rescheduling indebtedness for any reason;
- (d) the value of assets being less than liabilities (taking into account contingent and prospective liabilities); or
- (e) a moratorium being declared for the whole or any part of indebtedness.

#### 18.4.2 **Meaning of *Insolvency Proceedings***

In this clause 18.4.2 in relation to any person *Insolvency Proceedings* means the taking of any corporate action, legal proceedings or other procedure or steps in relation to any of:

- (a) suspension of any payments;
- (b) moratorium of any indebtedness;
- (c) winding-up;
- (d) dissolution, administration, or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) except (in the case of a corporation) solvent liquidation or reorganisation;
- (e) composition, compromise, assignment, or arrangement with any creditor;
- (f) appointment of a liquidator (except on a solvent liquidation), receiver, administrative receiver, administrator, compulsory manager or similar officer for the person or any part of its assets;
- (g) (in the case of an individual) appointment of a trustee in bankruptcy or a provisional receiver or similar officer for that individual or any part of his assets; or
- (h) the enforcement of any security or distraint by anyone over any assets.

### 19 **Dispute Resolution**

#### 19.1 **Parties must try to resolve by agreement**

19.1.1 If the Council and the Developer are in dispute about anything arising out of this Agreement the parties will initially try to resolve the dispute by agreement in accordance with dispute resolutions procedures which are in the remit of the Project Steering Group as quickly as possible. If the dispute has not been resolved within 21 working days it will be referred (in the absence of any express provision to the contrary) to an Independent Person appointed jointly by the Council and the Developer.

19.1.2 Clause 19.1.1 will not apply to any dispute arising under clauses [ ], if the Project Steering Group has not been established or has ceased to exist or in relation to any matter related to or following an Event of Insolvency.



## 19.2 **Meaning of Independent Person**

The Independent Person is to have suitable relevant post qualification experience and his identity will be agreed between the Council and Developer.

## 19.3 **Appointment by third party**

If the Council and the Developer cannot agree on the Independent Person's identity he is to be appointed at the request of either the Council or the Developer by the president or chairman for the time being (*the President*) of whichever of the following bodies is most appropriate having regard to the nature of the dispute:

19.3.1 The Royal Institution of Chartered Surveyors;

19.3.2 The Royal Institute of British Architects;

19.3.3 The Institution of Electrical Engineers;

19.3.4 The Institution of Structural Engineers;

19.3.5 The Institute of Chartered Accountants in England & Wales; or

19.3.6 The Law Society of England and Wales.

## 19.4 **Arbitrator not expert**

Unless otherwise required by the Council the Independent Person is to act as arbitrator in accordance with the Arbitration Act 1996 and the costs of the arbitration will be payable by the Council and the Developer in the proportions determined by the Independent Person.

## 19.5 **Expert provisions if needed**

If the Independent Person is to act as expert then the following provisions will apply:

19.5.1 the Independent Person will be instructed to allow each of the Council and the Developer to make representations and counter-representations as to the matters in dispute and to give them due consideration (but the Independent Person is not to be bound by them);

19.5.2 the Independent Person will be instructed to give his decision as quickly as possible in writing with copies being sent simultaneously to the Council and the Developer and to give reasons for his decision;

19.5.3 the Independent Person's determination will be final and binding on the Council and the Developer and the Guarantor (except in cases of manifest error);

19.5.4 if the Independent Person dies, delays or becomes unwilling or incapable of acting, either the Council or the Developer may ask the President to discharge and replace the Independent Person; and

19.5.5 the costs of the appointment of the Independent Person will be paid by the Council and the Developer in the proportions that the Independent Person

decides or in the absence of any such decision from the Independent Person in equal shares.

19.6 **Costs**

Where costs of the Independent Person remain unpaid by the party liable to pay them pursuant to this clause, the other party may discharge those costs and recover the sum so paid from the defaulting party as a debt on written demand.

20 **Continuation of this Agreement**

Each of the obligations undertaken by the parties to this Agreement will (unless already performed) continue in full force and effect notwithstanding completion.

21 **No Partnership or Council**

21.1 This Agreement does not constitute a partnership or joint venture or any contract of employment between the Council and the Developer and the Guarantor

21.2 The Developer will not be, or be deemed to be, an agent of the Council and the Developer will not hold itself out as having authority or power to bind the Council in any way.

22 **Consents by Council or Developer**

22.1 The Council and the Developer agree that any requests for consent under this Agreement will be dealt with as soon as reasonably practicable and that where either party withholds its consent it will give its reasons in writing at the same time.

22.2 Insufficiency of information upon which to make a decision will constitute a valid reason to refuse consent (subject to identification of any such additional information as is required by the party who asserts this as a reason for refusing consent).

22.3 Where it is provided in this Agreement that the Council or the Developer will not unreasonably withhold its consent the relevant party agrees that it will not unreasonably withhold or delay its consent.

22.4 In this clause 22 references to **consent** will be deemed to include references to **approval**.

22.5 Where the Council's consent or approval is required to any plan, specification or other relevant document under this Agreement which relates to the Development Works, the following procedure shall apply:

22.5.1 two copies of such document will be forwarded by the Developer to the Surveyor under cover of a transmittal note (and provided that where the matters covered by the transmittal note comprise material issues relating to drawings the Developer shall give to the Council at least 5 Working Days' notice that such transmittal note is to be forwarded). The Surveyor shall, as soon as practicable and in any event within 10 Working Days from receipt of such notice, return one copy of the transmittal note endorsed as follows:

(a) A = "proceed";

(b) B = "proceed with comments";

- (c) C = "comments"; or
- (d) D = "do not proceed" (with comments);

and in the latter three instances, the Surveyor's comments shall be attached to the transmittal note.

- 22.5.2 in the case of any transmittal note returned endorsed "proceed" the Developer may proceed without further reference to the Surveyor;
  - 22.5.3 subject to clause 22.5.7 below, in the case of any transmittal note returned endorsed "proceed with comments" then the Developer shall consider those comments and provide a copy of the amended document or proposal to the Surveyor if it considers that amendments are required and may proceed without further reference to the Surveyor except as expressly provided by this Agreement;
  - 22.5.4 subject to clause 22.5.7 below, in the case of any transmittal note returned endorsed with "comments" then the document or proposal shall be revised by the Developer if it considers that amendments are required to take into account the comments of the Surveyor and re-submitted to the Surveyor under cover of a transmittal note and the procedures set out in clauses 22.5.1 to 22.5.4 (as appropriate) shall again apply;
  - 22.5.5 when making any comments, the Surveyor shall identify his reasons for so doing;
  - 22.5.6 where any transmittal note is returned by the Surveyor endorsed with "proceed with comments" or "comments", if the Developer disagrees with any comment it shall within 3 Working Days of receipt of the comment notify the Surveyor of that fact and provide an explanation of why it disagrees with the comment. Upon receipt of such notification the Surveyor shall within 3 Working Days either confirm or withdraw the comment. If no agreement can be reached the matter shall be determined by an Independent Person under clause 19;
  - 22.5.7 the Developer shall submit such further or other information, data or documents as the Surveyor may reasonably require for a full appreciation of any submission under this clause 22.5;
  - 22.5.8 review of any document or proposals under this clause 22.5 (in particular, making them "proceed" or "proceed with comments" or similar) shall not relieve the Developer of any obligations warranties or undertakings imposed upon or given by it under this Agreement;
- 22.6 Any dispute between the parties as to whether a consent is being or has been unreasonably withheld or delayed will be determined by an Independent Person under clause 19.

23      **Joint And Several Liability**

Where the Developer is more than one person the Council may release or compromise the liability of any of those persons under this Agreement or grant time or other indulgence without affecting the liability of any other of them.

24      **Contracts (Rights Of Third Parties) Act 1999**

24.1      **No intended third party benefits**

Nothing in this Agreement is intended to confer any benefit on any person who is not a party to it.

24.2      **Parties free to vary Agreement**

The parties may, by agreement, rescind or vary this Agreement without the consent of any third party to whom the right of enforcement of any of its terms has been expressly provided.

25      **Entire Agreement**

25.1      **Previous agreements superseded**

This Agreement and the documents annexed to it constitute the entire agreement and understanding of the parties and supersede any previous agreement between them relating to the subject matter of this Agreement.

25.2      **No warranty relied on**

The Developer acknowledges and agrees that in entering into this Agreement, it does not rely on and will have no remedy in respect of any statement, representation, warranty, collateral agreement or other assurance (whether negligently or innocently made) of any person (whether party to this Agreement or not) other than as expressly set out in this Agreement or the documents annexed to it or in any written replies which the Council's Solicitors have given to any enquiries raised by the Developer's Solicitors before the date of this Agreement. Nothing in this clause 25.2 will, however, operate to limit or exclude any liability for fraud.

25.3      **Duplicate parts form one contract**

This contract may be executed in any number of duplicate parts all of which taken together will on exchange constitute one contract.

25.4      **Severability**

If any term, condition or provision of this Agreement is held to be invalid, unlawful or unenforceable to any extent such term, condition or provision will not affect the validity, legality and enforceability of the other provisions of this Agreement or any document referred to in this Agreement.

## 26 Notices

### 26.1 Notices to be written

Any notice given under this Agreement must be in writing and must be served by delivering it personally or sending it by pre-paid first class post, or special delivery post to the address and for the attention of the relevant party as follows:

26.1.1 to the Developer at:

[ADDRESS]

marked for the attention of [NAME]

or at the Developer's Solicitors, quoting the reference [REFERENCE];

26.1.2 to the Council at:

[ADDRESS]

marked for the attention of [NAME]

or at the Council's Solicitors, quoting the reference CKP.32998.58;

### 26.2 Deemed time of receipt

Any such notice will be deemed to have been received:

26.2.1 if delivered personally, at the time of delivery but if delivery occurs before 9.00 am on a working day the notice will be deemed to have been received at 9.00 am on that day, and if delivery occurs after 5.00 pm on a working day, or on a day which is not a working day, the notice will be deemed to have been received at 9.00 am on the next working day.

26.2.2 in the case of pre-paid first class or special delivery post at 9.00 am on the second working day after posting.

### 26.3 Proof of service

In proving service it will be sufficient to prove that delivery was made or that the envelope containing the notice was properly addressed and posted as a prepaid first class or recorded delivery letter, as the case may be.

### 26.4 Email or fax

A notice given under this Agreement will not be validly served if sent by e-mail or by fax.

### 26.5 Condition 1.3 disapplied

This clause replaces Property Condition 1.3.

## **27 Confidentiality and freedom of information**

### **27.1 Confidential Agreement**

Subject to clause 27.2 the parties will keep in confidence the details of this Agreement and all information received from the other party relating to this Agreement the Development and the Developer's Works and will use reasonable endeavours to prevent their employees and agents from disclosing any such details or information.

### **27.2 Permitted disclosures**

Clause 27.1 will not apply to:

- 27.2.1 any disclosure of information that is reasonably required by any persons engaged in the performance of their obligations under this Agreement for the performance of those obligations;
- 27.2.2 any matter which either party can demonstrate is already or becomes generally available and in the public domain otherwise than as a result of a breach of this clause 27;
- 27.2.3 any disclosure to enable a determination to be made under clause 19 or in connection with a dispute between the Developer and any Sub-Contractor;
- 27.2.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is in accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 27.2.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;
- 27.2.6 any provision of information to the parties' own professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Developer in connection with carrying out its obligations under this Agreement, in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 27.2.7 any disclosure by the Council of information relating to the design, construction, operation and maintenance of the Development and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed new developer, its advisers and lenders should the Council decide to re-tender this Agreement;
- 27.2.8 any application for registration or recording of the Planning Permission or Relevant Consents and any property registration required;

- 27.2.9 any disclosure of information by the Council to any other department, office or Council of the Government or their respective advisers or to any person engaged in providing services to the Council for any purpose related to or ancillary to this Agreement; and
- 27.2.10 any disclosure for the purpose of:
- (a) the examination and certification of the Council's or the Developer's accounts; or
  - (b) any examination pursuant to the Local Government Act 1999 of the economy, efficiency and effectiveness with which the Council has used its resources;
  - (c) complying with a proper request from either party's insurance advisers, or insurers on placing or renewing any insurance policies; or
  - (d) (without prejudice to the generality of clause 27.2.4) compliance with the FOIA or the Environmental Information Regulations.

### **27.3 Exploitation of information**

The Developer will not make use of this Agreement or any information issued or provided by or on behalf of the Council in connection with this Agreement otherwise than for the purposes of this Agreement, except with the written consent of the Council.

### **27.4 Freedom of information**

- 27.4.1 The Developer acknowledges that the Council is subject to the requirements of the FOIA and the Environmental Information Regulations and will facilitate the Council's compliance with its information disclosure requirements pursuant to the same in the manner provided for in this clause 27.4.
- 27.4.2 Where the Council receives a Request for Information in relation to Information that the Developer is holding on its behalf the Council will transfer to the Developer such Request for Information that it receives as soon as practicable and in any event within seven Working Days of receiving a Request for Information and the Developer will:
- (a) provide the Council with a copy of all such Information in the form that the Council requires as soon as practicable and in the event within seven Working Days (or such other period as the Council acting reasonably may specify) of the Council's request; and
  - (b) provide all necessary assistance as reasonably requested by the Council in connection with any such Information, to enable the Council to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.
- 27.4.3 Following notification under clause 27.4.2 and up until such time as the Developer has provided the Council with all the Information specified in clause

27.4.2(a), the Developer may make representations to the Council as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the Information requested, provided always that the Council will be responsible for determining at its absolute discretion:

- (a) whether the Information is exempt from disclosure under the FOIA and the Environmental Information Regulations; and
- (b) whether the Information is to be disclosed in response to a Request for Information, and

in no event will the Developer respond directly or allow its Sub-Contractors to respond directly to a Request for Information unless expressly authorised to do so by the Council.

- 27.4.4 The Developer will ensure that all Information held on behalf of the Council is retained for disclosure for at least twelve years from the date it is acquired and will permit the Council to inspect such Information as requested from time to time.
- 27.4.5 The Developer will transfer to the Council any Request for Information received by the Developer as soon as practicable and in any event within two Working Days of receiving it.
- 27.4.6 In the event of a Request for Information from the Council pursuant to clause 27.4.2 the Developer will as soon as practicable, and in any event within five Working Days of receipt of such Request for Information, inform the Council of the Developer's estimated costs of complying with the Request for Information to the extent these would be recoverable if incurred by the Council under section 12(1) of the FOIA and the FOIA Fees Regulations. Where such costs (either on their own or in conjunction with the Council's own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOIA and as set out in the FOIA Fees Regulations the Council will inform the Developer in writing whether or not it still requires the Developer to comply with the Request for Information and where it does require the Developer to comply with the request the seven Working Days period for compliance will be extended by such number of additional days for compliance as the Council is entitled to under Section 10 of the FOIA. In such case the Council will notify the Developer of such additional days as soon as practicable after becoming aware of them and will reimburse the Developer for such costs as the Developer incurs in complying with the request to the extent the Council is itself entitled to reimbursement of such costs in accordance with its own FOIA policy from time to time.
- 27.4.7 The Developer acknowledges that (notwithstanding the provisions of clause 27.1) the Council may, acting in accordance with any code of practice under Part 1 of the FOIA, be obliged under the FOIA or the Environmental Information Regulations to disclose Information concerning the Developer or the Development:
  - (a) in certain circumstances without consulting with the Developer; or



(b) following consultation with the Developer and considering its views.

**27.5 Disclosure to financiers**

Clause 27.1 will not prevent disclosure to a party's advisers, bankers or financiers or the Building Contractor and the Professional Team on a confidential basis.

**28 Guarantor covenant**

**28.1 Guarantee**

In consideration of the Developer entering into this Agreement at its request, the Guarantor as primary obligor covenants with and guarantees to the Council that the Developer will observe and perform all the covenants contained or implied in this Agreement and, that if it fails to do so, the Guarantor will do so and will indemnify the Council against all losses, costs and liabilities incurred by the Council as a result of that failure.

**28.2 Certain events will not affect the guarantee**

This guarantee and covenant will continue notwithstanding (and the liability of the Guarantor will not be discharged in whole or in part or otherwise affected) by:

28.2.1 any forbearance by the Council to enforce against the Developer its covenants in this Agreement;

28.2.2 the giving of time or other concessions, or the taking or holding of, or varying realising releasing or not enforcing any other security for the liabilities of the Developer;

28.2.3 any legal limitation or incapacity relating to the Developer;

28.2.4 the invalidity or unenforceability of the obligations of the Developer;

28.2.5 the Developer ceasing to exist;

28.2.6 any other act or omission of the Council or any other circumstances other than the operation of any statute which but for this clause would discharge the Guarantor.

**28.3 Principal debtor**

Any money payable by the Developer under this Agreement which may not be recoverable from the Developer for any reason will be recoverable by the Council from the Guarantor as principal debtor.

**28.4 No set-off or counter-claim**

All payments made by the Guarantor under this covenant will be made without set-off or counterclaim.

## 28.5 **Withholding tax treatment**

If the Guarantor is required by law to make any deduction or withholding from any payment due to the Council under this covenant (except for deduction of tax which the Council can reclaim from the HM Revenue and Customs), the sum due from the Guarantor as payment will be increased to the extent necessary to ensure that after that deduction or withholding the Council receives and retains a net sum equal to the sum which but for the deduction or withholding it would have received.

## 29 **HM Land Registry**

The Developer may apply for the entry of a unilateral notice on the Council's title to the Property to protect the Developer's interest under this Agreement.

## 30 **Jurisdiction**

The parties irrevocably:

- 30.1 submit to the exclusive jurisdiction of the English courts in relation to and waive, and agree not to raise, any objection which they may now or in the future have to the jurisdiction of the English courts dealing with any proceedings for enforcement of the obligations in this Agreement,
- 30.2 agree that any process may be served upon them by leaving a copy addressed to them at their addresses from time to time applicable to them under clause 26,
- 30.3 agree that this Agreement will be governed by and construed in all respects in accordance with the laws of England and that all proceedings in connection therewith will be the subject (and the parties hereby submit) to the exclusive jurisdiction of the English courts.

## 31 **Council's capacity**

- 31.1 Nothing contained or implied in this Agreement or any consent or approval granted pursuant to it will prejudice or affect the Council's rights, powers, duties and obligations in the exercise of its functions as the local authority or local planning authority or as agent for the highway authority and water authority.
- 31.2 Such rights, powers, duties and obligations under all public and private statutes, bylaws, regulations and statutory instruments may be as fully and effectually exercised in relation to the Property or any other property as if it were not party to this Agreement and any approval, consent, direction or authority given by the Council as local or other statutory authority will not be or be deemed to be an approval, consent, direction or authority given under this Agreement and vice versa.
- 31.3 Without prejudice to the remedies and contractual rights of the Developer in respect of a risk or liability or obligations expressly provided in this Agreement as being a risk, liability or obligations of the Council:
  - 31.3.1 nothing in this Agreement will operate as an obligation upon, or in any other way fetter or constrain, the Council in any capacity other than as a contracting party; and

- 31.3.2 the exercise by the Council of its duties powers and functions in any other capacity will not lead to any liability under this Agreement on the part of the Council to the Developer.

## 32 **Developer warranties**

The Developer warrants and represents to the Council that on the date of this Agreement:

- 32.1 it is properly constituted and incorporated under the laws of England and Wales and has the corporate power to own its assets and to carry on its business as it is now being conducted;
- 32.2 it has the corporate power to enter into and to exercise its rights and perform its obligations under this Agreement;
- 32.3 all action necessary on the part of the Developer to authorise the execution of and the performance of its obligations under this Agreement has been taken or, in the case of any agreement relating to the Development executed after the date of this Agreement, will be taken before such execution;
- 32.4 the obligations expressed to be assumed by the Developer under this Agreement are, or in the case of any agreement relating to the Development executed after the date of this Agreement will be, legal, valid, binding and enforceable to the extent permitted by law and each such agreement is or will be in the proper form for enforcement in England;
- 32.5 the execution, delivery and performance by it of any agreement relating to the Development does not contravene any provision of:
- 32.5.1 any existing legislation either in force or enacted but not yet in force binding on the Developer;
  - 32.5.2 the constitution of the Developer;
  - 32.5.3 any order or decree of any court or arbitrator which is binding on the Developer;  
or
  - 32.5.4 any obligation which is binding upon the Developer or upon any of its assets or revenues.
- 32.6 no claim is presently being assessed and no litigation, arbitration or administrative proceedings are presently in progress or, to the best of the knowledge of the Developer, pending or threatened against it or any of its assets which will or might have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement or any other agreement relating to the Development;
- 32.7 it is not the subject of any other obligation, compliance with which will or is likely to have a material adverse effect on the ability of the Developer to perform its obligations under this Agreement or any other agreement relating to the Development;
- 32.8 no proceedings or other steps have been taken and not discharged (nor, to the best of the knowledge of the Developer, threatened) for its winding-up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, trustee or similar officer in relation to any of its assets or revenues;

and the Council relies upon such warranties and representations.

### 33 **Developer undertakings**

The Developer undertakes with the Council that for so long as this Agreement remains in full force:

- 33.1 it will upon becoming aware that any litigation, arbitration, administrative or adjudication or mediation proceedings before or of any court, arbitrator or authority may be threatened or pending and immediately after the commencement thereof (or within ten Working Days of becoming aware the same may be threatened or pending or with ten Working Days after the commencement thereof where the litigation or arbitration or administrative or adjudication or mediation proceedings is against a Sub-Contractor) give the Council notice of such litigation, arbitration, administrative or adjudication or mediation proceedings which would adversely affect to an extent which is material in the context of the Development and the Developer's ability to perform its obligations under this Agreement;
- 33.2 it will not without the prior written consent of the Council (and whether by a single transaction or by a series of transactions whether related or not) sell, transfer, lend or otherwise dispose of (other than by way of security) the whole or any part of its business or assets which would materially affect the ability of the Developer to perform its obligations under this Agreement;
- 33.3 it will not undertake the performance of its obligations under this Agreement otherwise than through itself or a Sub-Contractor;

### 34 **Status of warranties**

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Developer in this Agreement are cumulative and none will be given a limited construction by reference to any other.

### 35 **Developer's Due Diligence**

The Developer will subject to the terms of this Agreement be deemed to have:

- 35.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and
- 35.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed including:
  - 35.2.1 information as to the nature, location and condition of the land (including hydrological, geological, geotechnical and sub-surface conditions); and
  - 35.2.2 information relating to archaeological finds, areas of archaeological scientific or natural interest, local conditions and facilities and the quality of existing structures.

35.3 [ ] **[NB: reference to be expanded to refer to the material supplied to the Bidders via the Procurement dataroom and any other information supplied and relied upon during the dialogue]**

36 **No relief**

The Developer will not in any way be relieved from any obligation under this Agreement nor will it be entitled to claim against the Council on grounds that any information, whether obtained from the Council or otherwise (including information made available by the Council), is incorrect or insufficient other than information given in replies to written enquiries by the Council's Solicitors and will make its own enquiries as to the accuracy and adequacy of that information.

37 **Interest**

Without prejudice to any other right, remedy or power contained in this Agreement or otherwise available to any party, if any sums payable by one party to another party under this Agreement are not paid on the due date for payment or within the period specified for payment under this Agreement, whether legally demanded or not, the former will pay on demand to the latter interest thereon at the Contract Rate from the due date for payment calculated and accruing on a daily basis and compounded quarterly on the usual quarter days.

38 **Council's dealing rights**

For the avoidance of doubt and notwithstanding any other provision in this Agreement the Council may assign or otherwise deal with the whole or part of its interest and/or rights under this Agreement.

39 **Project Steering group**

The Council and the Developer shall:

- 39.1 use all reasonable endeavours to procure that the Project Steering Group operates in accordance with its **terms of reference annexed at Annex [ ]**;
- 39.2 ensure that their respective representatives are delegated all appropriate authorities in order to properly represent the relevant party on the Project Steering Group; and
- 39.3 provide such information as is reasonably requested by the Project Steering Group on an open and transparent basis unless it would be unlawful or in breach of this Agreement to do so.

40 **Personal covenants and restrictions on dealings**

- 40.1 The obligations on the part of the Developer contained in this Agreement are personal to the Developer, here meaning [ ] only.
- 40.2 The Developer will not assign or otherwise deal with the benefit of its interest under this Agreement in whole or in part and the Council will not be obliged to grant a Phase Licence and/or a Phase Transfer to any person other than the Developer.
- 40.3 The Developer may charge the benefit of this Agreement to a party providing finance which is fully applied towards the Developers Work's or any other items of Project Expenditure referred to in Schedule 7 provided that prior to Practical Completion this will be subject to obtaining the Landlord's prior written consent to the charge (such consent not to be unreasonably withheld or delayed).

41        **Co-operation**

41.1       The Council and the Developer agree to co-operate (but without being compelled to incur material expenditure in that respect) with the other in the fulfilment of the purposes and intent of this Agreement except that neither the Council nor the Developer will be under any obligation to perform any of the obligations on the part of the other under this Agreement.

41.2       The Council and the Developer agree to take due account of recommendations of the Project Steering Group where such recommendations do not conflict with the terms of this Agreement.

42        **Project Data**

The Developer will make available to the Council free of charge (and hereby irrevocably licences the Council to use) all Project Data that might reasonably be required by the Council and the Developer will ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Council on these terms for the purposes of:

42.1       the Council performing its duties under this Agreement and any statutory duties which the Council may have; and

42.2       the design or construction of the Development, the operation, maintenance or improvement of the Development or the provision of works the same as or similar to the Developer's Works if this Agreement is terminated pursuant to clause 18.3.

(together, the **Approved Purposes**), and in this clause "use" will include the acts of copying, modifying, adapting and translating the material in question or incorporating them with other materials and the term "the right to use" will be construed accordingly.

43        **Licence in respect of Intellectual Property Rights**

The Developer:

43.1       hereby grants to the Council, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use the Intellectual Property Rights which are or become vested in the Developer; and

43.2       will, where any Intellectual Property Rights are or become vested in a third party, use all reasonable endeavours to procure the grant of a like licence to that referred to in clause 43.1 to the Council,

in both cases, solely for the Approved Purposes.

44        **Vesting of Intellectual Property Rights**

The Developer will use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Developer and the Developer will enter into appropriate agreements with any Developer Related Party (or

other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

#### 45 Estate Management Company

45.1 [ ] **[NB: the bidders proposals for onward estate management to be confirmed.]**

45.2 [ ].

#### 46 Anti-bribery

46.1 The Developer shall:

46.1.1 comply with all applicable laws, statutes, regulations, and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 (Requirements);

46.1.2 not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK;

46.1.3 comply with the Council's Ethical, Anti-bribery and Anti-corruption Policies a copy of which is available here: <http://www.homesandcommunities.co.uk/ethical-policies>, in each case as the Council or the relevant industry body may update from time to time (Relevant Policies).

46.1.4 have and shall maintain in place throughout the term of this Agreement its own policies and procedures, including but not limited to adequate procedures under the Bribery Act 2010, to ensure compliance with the Requirements, the Relevant Policies and clause 46.1.2, and will enforce them where appropriate;

46.1.5 immediately report to the Council's Head of Risk and Assurance Services any request or demand for any undue financial or other advantage of any kind received by the Developer in connection with the performance of this agreement;

46.1.6 if required by the Council, produce a written certificate to it signed by an officer of the Developer, confirming compliance with this clause 46.1 by the Developer and all persons associated with it under clause 46.2. The Developer shall provide such supporting evidence of compliance as the Council may reasonably request.

46.2 The Developer shall ensure that any person associated with the Developer who is performing services or providing goods in connection with this Agreement does so only on the basis of a written contract which imposes on and secures from such person terms equivalent to those imposed on the Developer in this clause 46. The Developer shall be responsible for the observance and performance by such persons of the Relevant Terms, and shall be directly liable to the Council for any breach by such persons of any of the Relevant Terms.

46.3 Breach of this clause 46 shall be deemed a material breach

46.4 For the purpose of this clause 46, the meaning of adequate procedures and foreign public official and whether a person is associated with another person shall be determined in accordance with section 7(2) of the Bribery Act 2010 (and any guidance issued under section 9 of that Act), sections 6(5) and 6(6) of that Act and section 8 of that Act respectively. For the purposes of this clause 46 a person associated with the Developer includes but is not limited to any subcontractor of the Developer.

#### 47 **Anti-Modern Day Slavery**

47.1 The Developer undertakes to the Council that the Developer:

47.1.1 has not and its current and former directors, officers and employees have not and shall not engage in any activity, practice or conduct which could or would place the Developer or the Council in breach of the Modern Slavery Legislation or activity which would constitute an offence under the Modern Slavery Legislation if the conduct took place in the United Kingdom;

47.1.2 has and shall maintain and implement:

(a) procedures to ensure compliance with the Modern Slavery Legislation; and

(b) adequate procedures designed to prevent conduct that would give rise to an offence under the Modern Slavery Legislation;

47.1.3 shall include undertakings (on the part of the parties hereafter mentioned) similar to those contained in this clause 47 in any contract it may enter into with sub-consultants, sub-contractors and suppliers;

47.1.4 from time to time, at the reasonable request of the Council, will confirm in writing that it has complied with its undertakings in this clause and will provide any information reasonably requested by the Council in support of such compliance.

47.2 The Developer shall maintain adequate records to assist in verifying its compliance with the provisions of this clause and shall permit the Council and its third party representatives, immediately upon request during normal business hours to assess and take copies of such records and to meet with the Developer's personnel to audit the Developer's compliance with its obligations under this clause. The Developer shall give all necessary assistance to the conduct of such audits.

47.3 Audit access by any third party representative of the Council in accordance with clause 47.2 shall be subject to such representative agreeing to be bound by confidentiality obligations equivalent to those in clause in respect of the information obtained provided that all information obtained may be disclosed to the Council.

47.4 In the event of breach of this clause by the Developer and/or breach by any sub-consultant or sub-contractor or supplier of equivalent clauses required under clause 47.1.4 and/or if the Developer, sub-consultant, sub-contractor or supplier is convicted of an offence under the Modern Slavery Legislation in relation to this Agreement or any other contract (whether or not the Council is a party to that contract), the parties agree that the Council may at its sole discretion terminate this Agreement in which case:



- 47.4.1 the provisions of clauses [ ] and [ ] shall apply; and
- 47.4.2 (if applicable) the Council shall be at liberty to terminate any other contract entered into between the same parties (whether in relation to the Development, the Property, the Works or otherwise) and any such termination shall be deemed to be termination for the Developer's default.
- 47.5 The Developer further undertakes to the Council that:
- 47.5.1 if required by law to do so, it shall, for each and every financial year of the Developer, comply with its obligations under S.54 of the Modern Slavery Act by publishing a Human Trafficking Statement; and
- 47.5.2 it shall conclude an undertaking similar to that contained in clause 47.5.1 in any contract it may enter into with sub-consultants, sub-contractors and suppliers.
- 47.6 In the event of any breach of this clause the parties agree that the Council may by notice in writing to the Developer require that such breaches will be rectified within 7 days of receipt of such notice. If the Developer fails to rectify such breaches in accordance with the notice the Council may in its sole discretion terminate the Agreement in which case:
- 47.6.1 this Agreement and the provisions of clauses [ ] and [ ] shall apply; and
- 47.6.2 (if applicable) the Council shall be at liberty to terminate any other contract entered into between the same parties (whether in relation to the Development, the Property, the Works or otherwise) and any such termination shall be deemed to be termination for the Developer's default.
- 47.7 The Developer shall indemnify the Council against any losses, liabilities, damages, costs (including but not limited to legal fees) and expenses incurred by, or awarded against, the Council as a result of:
- 47.7.1 any breach of this clause by the Developer;
- 47.7.2 any breach of provisions equivalent to those contained in this clause in any contract with a sub-consultant, sub-contractor or supplier; or
- 47.7.3 any act or omission by a sub-consultant or sub-contractor or supplier which would have amounted to a breach of the relevant sub-contract had the Developer complied with its undertaking set out in clause [ ].
- 48 **Press announcements**
- 48.1 Prior to making any announcements or similar public statements on this Agreement and/or any document referred to in it each party shall obtain the prior written approval of the other to the wording of the press statement or similar public announcement (such approval not to be unreasonably withheld or delayed).
- 48.2 All publicity and/or media announcements or statements to be made by the Buyer must be sent in draft form to the Agency within a minimum of five Working Days to review and approve prior to release.

This Agreement has been executed as a deed and is delivered on the date stated at the beginning of it.

The common seal of **Torbay Council** was hereunto affixed in the presence of:

[ ]

Executed as a deed by **Developer** acting by:

Director

Director/Secretary

Executed as a deed by the **Guarantor** acting by:

Director

Director/Secretary

## Schedule 1

### Title documents

Date	Description	Parties	Missing?

## Schedule 2

### Part 1 - Matters affecting the Property

Date	Description	Parties	Missing?

### Part 2 - Tenancies affecting the Property

Date	Description	Parties	Term expiry

## Schedule 3

### Conditions

***[NB: further detail / relevant for each Phase to be discussed as part of dialogue]***

#### 1 Relevant Conditions

The Conditions comprise:

- 1.1 in respect of every Phase the general conditions at paragraphs 2 and 3; and
- 1.2 in respect of each individual Phase the specific conditions relevant to that Phase as set out paragraph 4.

#### 2 Definition of each Condition

##### 2.1 Planning

The grant of Planning Permission in accordance with Schedule 4 (the **Planning Condition**).

##### 2.2 [Viability]

**The Developer producing an Updated Viability Appraisal approved by the Council in accordance with paragraph 3.1 of this Schedule 3 (the Viability Condition).]**

##### 2.3 [Third parties]

The binding agreement of any third party in order to satisfy any planning condition contained in any Planning Agreement entered into prior to the grant of Planning Permission or required to satisfy a condition of any Planning Permission or any other restriction or covenant which:

- 2.3.1 prevents the carrying out of the Development or any part of it or the use or occupation or opening for trade of the Development or any part of it and which requires the agreement of a third party before it can be satisfied; or
- 2.3.2 requires the Developer to carry out works or contribute towards or pay for the cost of works outside the Property which cannot be carried out without the agreement of a third party,

(the **Third Party Rights Condition**).]

##### 2.4 Site surveys

The receipt by the Developer of [ecological and environmental condition] surveys in an Acceptable Form (as defined at paragraph 3.4 of this Schedule 3) (the **Site Surveys Condition**).

***[NB: the Council is intending to prepare an ecological and environmental condition survey for disclosure to bidders and the drafting of this condition will need to take***

***that into account. The Council must quickly confirm its intended strategy for dealing with the identified ecology issues at CSM.]***

**2.5 [NB: drafting of remaining conditions to be developed, to include:**

**2.5.1 [Vacant Possession Condition];**

**2.5.2 [NB: specific conditions linked to Phases].**

### **3 Detailed Provisions in relation to Conditions**

#### **3.1 Viability Condition**

3.1.1 [The Developer will produce to the Council an Updated Viability Appraisal within 4 weeks of the date of grant of the Planning Permission.

3.1.2 The Updated Viability Appraisal will:

- (a) be consistent in form and calculation methods with the Viability Appraisal;
- (b) be consistent with and reflective of the Submission Plans; and
- (c) represent the Developer's reasonable estimate on an open book basis of Project Expenses at the time of submission of the Updated Viability Appraisal.]

#### **3.2 Road Orders Condition**

3.2.1 The Developer will consult with the Council on the preparation of the case for any inquiry and will keep the Council fully informed of all steps in the procedure and will have regard to any representations made by the Council.

3.2.2 In the event of an application being made to challenge a Road Order, the Developer will apply to the High Court to become a party to such proceedings and will take all reasonable steps to ensure that the Road Closure Order is upheld unless in leading counsel's opinion (following a joint instruction by the Developer and the Council to advise) there is no reasonable prospect of the High Court dismissing the application.

#### **3.3 [Third Party Rights Condition**

3.3.1 The Developer will as soon as reasonably practicable negotiate the terms of agreements with owners and occupiers of neighbouring property for the release of any rights or interests in land to the extent that those rights and interests in land would be infringed by the Development or would prevent or impede the carrying out of the Development or the use and enjoyment of the Property.

3.3.2 The Developer will not settle the terms of any release without the prior approval of the Council. The Council will not unreasonably withhold or delay its giving of approval of the release.

- 3.3.3 Where the release or modification of any restrictive covenant cannot be negotiated, the Developer will take such action for its discharge or modification as may be available to the Developer under Section 84 of the Law of Property Act 1925.]

#### 3.4 **Site Surveys Condition**

- 3.4.1 The Developer will obtain ground, site and environmental condition surveys (the **Site Surveys**) in accordance with the Target Programme. ***[NB: Council to confirm what information it will provide and what the Development is expected to obtain.]***
- 3.4.2 The Site Surveys Condition will not be satisfied until the Developer has received Site Surveys in an Acceptable Form.
- 3.4.3 The Site Surveys will be deemed to be in an "**Acceptable Form**" unless their conclusions:
- (a) materially affect the viability of the Development having regard to the [Developer's Required Return];
  - (b) materially affect the Target Programme or the Developer's method statement for the Development;
  - (c) materially affect the proposed uses of the Development; or
  - (d) materially adversely affect the cost of carrying out and completing the Development.

#### 4 **Further Phase Conditions**

***[NB: it is presumed that the Development will be delivered in Phases and that the only condition for the release of each phase is the Developer reaching an agreed point in the delivery / build programme. To be confirmed in dialogue and provisions to follow accordingly.]***

- 4.1 Phase 1 – [ ];
- 4.2 Phase 2 – [ ];
- 4.3 Phase 3 – [ ];

#### 5 **[Waiver**

The [Developer] will be entitled to waive any of the following Conditions:

- 5.1 [ ]]



## **Schedule 4**

### **Planning Condition**

#### **1 Working up the Planning Application**

The Developer will at its own expense prepare the Planning Application in consultation with the Council will use all reasonable endeavours to obtain the Planning Permission.

#### **2 The Planning Application must be consistent and compliant with:**

2.1.1 the Tender Submission;

2.1.2 required Affordable Housing Mix;

2.1.3 Development Brief;

2.1.4 Design data;

2.1.5 Design and Sustainability Standards; and

2.1.6 the Minimum Development.]

#### **2.2 The Developer shall use all reasonable endeavours to agree as quickly as possible with the Council and the Local Planning Authority any matters and arrangements necessary to facilitate the requirements of any Planning Agreement.**

#### **3 Form of application**

##### **3.1 The Developer will as soon as reasonably practicable (and in any event no later than 3 months prior to formally submitting the Planning Application to the local planning authority) submit to the Council for approval the proposed Planning Application and all supporting plans, drawings, specifications, elevations, cross-sections and other accompanying information including an Affordable Housing Mix proposal, an environmental impact assessment and a transport assessment plan.**

##### **3.2 The Council's approval to the proposed Planning Application will not be unreasonably withheld or delayed provided that the application has been prepared in accordance with the Developer's obligations under this Agreement and is consistent with paragraph 2 above.**

##### **3.3 The Council will use reasonable endeavours to provide to the Developer its approval or written reasons for refusal within 20 Working Days of request for approval of the proposed Planning Application.**

##### **3.4 The Developer may not amend, substitute, vary or withdraw any Planning Application or make any new or additional application or any application for reserved matters approval without the Council's approval (not to be unreasonably withheld or delayed if the Developer's proposal is consistent with paragraph 2 above.**

#### 4 **Duty to consult**

4.1 Before and following the submission of the Planning Application the Developer will, if necessary or desirable in order to achieve the grant of the Planning Permission, consult with:

4.1.1 the local planning authority to ascertain local planning policy; and

4.1.2 [ ].***[NB: Council to confirm consultation requirements. This is beyond or in addition to planning law requirements.]***

#### 5 **Extension of time for decision**

The Developer may agree with the local planning authority the extension of the statutory period for the giving of its notice under section 78(2) of the Town and Country Planning Act 1990 subject to the prior written consent of the Council such consent not to be unreasonably withheld or delayed.

#### 6 **Duty to report progress**

The Developer will keep the Council informed as to the progress of the application for Planning Permission and will in particular give the Council a copy of all applications, material correspondence and documents relating to it. The Developer will also give the Council as much notice as practicable of meetings with the local planning authority and the Council or its duly appointed representative and the Council's professional advisors may when practicable attend and participate at agreed meetings with the local planning authority to discuss the progress of the application.

#### 7 **Appeals**

[ ] ***[NB: insert the Developer's right to appeal if requested by bidders.]***

#### 8 **Grant of planning permission**

The Planning Condition will be discharged by the grant of the Planning Permission either by the local planning authority or by the Secretary of State acting under section 77 or 79 of the 1990 Act or, if the grant of the Planning Permission is subject to Challenge, the Planning Condition will be discharged by final determination upholding the Planning Permission.

#### 9 **Onerous conditions**

##### 9.1 **Deemed refusal**

If a Planning Permission is granted subject to Onerous Conditions it will be a Planning Refusal for the purposes of this Agreement.

##### 9.2 **Meaning of Onerous Condition**

***[NB: Onerous Conditions to be discussed during Dialogue and proposed by Developer. Onerous Conditions must not include matters inconsistent with Developer's Tender Submission as accepted by Council.]***

An Onerous Condition means in this context an obligation or restriction of any one or more of the following kinds:

[ ].

## 10 **Planning obligations**

The Developer will, if required, negotiate the terms of planning or other obligations under Section 106 of the Town and Country Planning Act 1990, Section 38 or Section 278 of the Highways Act 1980 and Section 104 of the Water Industry Act 1991 needed to obtain the Relevant Consents but will not settle the terms of those documents without the approval of the Council. The Council will not unreasonably withhold or delay its approval of those documents.

## 11 **Planning Performance Agreement**

11.1 [ ].

11.2 [ ]

11.3 ***[NB: the Local Planning Authority is likely to want a form of Planning Performance Agreement. The details of which are to be agreed]***

## Schedule 5

### Phase Licences and Phase Transfers

#### 1 Completion of Phase Licences

##### 1.1 Grant of Phase Licence

In consideration of the payments referred to in the relevant Phase Licence to be paid to the Council (including the Licence Fee) the Council will grant and the Developer will accept and the Guarantor will guarantee each Phase Licence on the **[Date]** on the terms of this Agreement and in accordance with this Schedule 5 land ownership will not transfer when the Conditions are satisfied. ***[NB: Phase licences will be granted over phase sites to allow for any Preliminary Works or investigations required in advance of the Planning Permission being granted.]***

##### 1.2 Grant of licence to others connected with the Development

The parties agree that each Phase Licence will permit the Developer to licence the Building Contractor, its Sub-contractors, the Professional Team and those authorised by them to enter the Property for the purpose only of carrying out Preliminary Works subject to compliance with the terms of the relevant Phase Licence. ***[NB: details to be agreed.]***

##### 1.3 Equipment, etc.

Any licence granted by or under a Phase Licence includes a right to bring onto the Property all vehicles, plant, equipment and materials required to complete the Preliminary Works.

##### 1.4 No estate created

A Phase Licence will not create any new estate nor give any person any title to or any legal interest in the Property.

##### 1.5 Termination of Phase Licence

***[NB: timing to be discussed as part of dialogue]***

##### 1.6 Licence Fee

The Developer will pay to the Council the Licence Fee for each Phase in accordance with the relevant Phase Licence.

#### 2 Completion of Phase Transfers

##### 2.1 Date

2.1.1 Upon the Phase 1 Completion Date the Council shall transfer Phase 1 and the Developer shall take a transfer of Phase 1 by means of the Phase 1 Transfer.

2.1.2 Upon Completion of the Phase 1 Transfer the Developer will pay the Phase 1 Price to the Council.

- 2.1.3 Upon the Phase 2 Completion Date the Council shall transfer Phase 2 and the Developer shall take a transfer of Phase 2 by means of the Phase 2 Transfer.

Upon Completion of the Phase 2 Transfer the Developer will pay the Phase 2 Price to the Council.

- 2.1.4 Upon the Phase 3 Completion Date the Council shall transfer Phase 3 and the Developer shall take a transfer of Phase 3 by means of the Phase 3 Transfer.

Upon Completion of the Phase 3 Transfer the Developer will pay the Phase 3 Price to the Council.

**2.2 [ ]. [NB: the draw down mechanism of subsequent Phases to be confirmed. In relation to the Affordable Housing this will be a turnkey based drawdown. See separate provisions.]**

**2.3 No Council presumed**

Unless expressly agreed in writing to the contrary, the Council's Solicitors will not be deemed to be acting as the Developer's Solicitor's agents on Completion.

**2.4 Deeds delivery method**

Unless the Developer's Solicitors collect the deeds and documents to which the Developer is entitled on Completion under this Agreement, the Council's Solicitors will send them to the Developer's Solicitors by special delivery post or by document exchange or by hand and neither the Council nor the Council's Solicitors will be liable for their loss in transit.

**2.5 Timing**

The Council will not be required to complete before 9.30am or after 5.30pm on a Working Day nor at any time on a day which is not a Working Day.

**3 Mechanics of completion**

**3.1 Engrossments and execution**

The Council will instruct the Council's Solicitors to prepare engrossments of the original and counterpart of each Phase Licence and Phase Transfers not less than five Working Days prior to the relevant Completion Date. The Developer and the Guarantor will promptly execute the counterpart of each Phase Licence and Phase Transfers on receipt preparatory to the grant of that Phase Licence and/or Phase Transfers.

**3.2 Completion: location and timing**

Each Phase Licence and Phase Transfer will be completed at the offices of the Council's Solicitors or at such other place as the Council's Solicitors reasonably require on the Completion Date.

**3.3 Form of Phase Transfers - variations**

The parties agree that prior to completion of each Phase Transfer the Council or the Developer may propose for agreement by the other (such agreement in each case not to

be unreasonably withheld or delayed) such additions or modifications to each Phase Transfer (including to any rights granted or reserved) and to the plans to be annexed thereto as may reasonably be required:

- 3.3.1 to describe properly the relevant Phase as eventually designed in accordance with this Agreement,
- 3.3.2 to exclude any areas which have been adopted, and
- 3.3.3 to ensure that adequate and appropriate rights are granted and reserved to enable the relevant Phase and any land retained by the Council or available for public use to be properly used and operated in accordance with the terms of the Phase Transfers.

## **4 Title**

### **4.1 Evidence of title**

The Developer admits and agrees that:

- 4.1.1 in respect of the parts of the Property title to which is registered at HM Land Registry, the Council has supplied to the Developer official copies of the registers and all documents referred to in the registers of title (except for any documents identified as missing in Schedule 1) maintained at HM Land Registry.
- 4.1.2 [in respect of the parts of the Property title to which is unregistered, the Council's title to the Property has been deduced to the Developer's Solicitors before the date of this Agreement. The documents of title are listed in Schedule 1 and copies have been given to the Developer's Solicitors (except where the document is identified as missing in Schedule 1).]

### **4.2 No requisitions**

The Developer is deemed to have investigated and accepted that title and the Developer will raise no requisitions or objections concerning it.

### **4.3 Missing deeds**

The Council does not have in its possession the originals or certified copies of any of the documents identified in Schedule 1 or Schedule 2 as "Missing" but, to the extent that the Council can, it has supplied the Developer with copies of them. The Developer is not entitled to raise any enquiry, objection, requisition or claim about them or any matter referred to in them. **[NB: To be confirmed by the Council.]**

### **4.4 Condition 6 (title and transfer)**

[Property Conditions 6.1, 6.2 and 6.3 do not apply to this Agreement.]

### **4.5 No Warranty**

Except as otherwise expressly provided in this Agreement the Developer will take the Property in its state and condition in all respects as at the date of this Agreement and

nothing in this Agreement or otherwise will constitute or imply a warranty by or on the part of the Council as to the fitness and suitability of the Property or any part thereof for the Developer's Works or for any other purpose.

#### **4.6 Defects**

The Developer accepts, in relation to any building or structure on the Property, entire responsibility (including any financial and other consequences which result whether directly or indirectly) for any Defects.

### **5 Matters Affecting The Property**

#### **5.1 Incumbrances**

For the purposes of Property Condition [3.1.2(a)] the incumbrances are:

5.1.1 any matters contained or referred to in the entries or records made in registers maintained by HM Land Registry as at [ ] under title number [ ] [and the Land Charges Department of HM Land Registry] as at [ ] other than financial charges;

5.1.2 interests that override first registration (as defined in schedule 1 to the Land Registration Act 2002), interests that override registered dispositions (as defined in schedule 3 to the Land Registration Act 2002) or interests the status of which is preserved as overriding by schedule 12 to the Land Registration Act 2002;

5.1.3 any matters disclosed in the documents listed in Schedule 1 and Schedule 2 whether or not there are missing deeds; and

5.1.4 [ ]

#### **5.2 Developer's deemed knowledge**

The Developer is deemed to have full knowledge of the matters referred covered by or to in Property Condition 3.1 and will not raise any enquiry, requisition or claim about or objection to any of them.

### **6 Property Conditions**

#### **6.1 Incorporation of Property Conditions**

Part 1 of the Property Conditions are incorporated into this Agreement and apply to the sale effected by it so far as they are:

6.1.1 applicable to a sale by private treaty;

6.1.2 not varied by or inconsistent with the express terms of this Agreement; and

6.1.3 applicable to the grant of a lease.

#### **6.2 Further Property Conditions disapplied**

6.2.1 [Part 2 of the Property Conditions do not apply to this Agreement.]

6.2.2 [The following Property Conditions in Part 1 of the Property Conditions do not apply to this Agreement: Property Conditions 1.3 and 7.1.4(b).] ***[NB: to be reviewed for sale rather than Lease.]***

### 6.3 **Contract Rate**

The contract rate for the purposes of the Property Conditions is 4% above the annual base lending rate of The Royal Bank of Scotland plc from time to time.

### 6.4 **Property Condition 1.2**

Property Condition 1.2 is varied by adding to the end of it:

*[where the Developer or the guarantor is more than one person, the Developer may release or compromise the liability of any of them under this contract or grant time or indulgence without affecting the liability of any other of them.]*

## **7 Affordable Housing Land Transfer**

7.1 [ ]. ***[NB: provisions as to for the transfer of the Affordable Housing Units to the Registered Provider to be confirmed. Bidders note that the intended structure will be***

***7.1.1 Transfer to the RP at turnkey stage – the draft Turnkey Contract has been provided to bidders for comment***

***7.1.2 The pricing for the units has been communicated separately as part of the commercial papers***

***7.1.3 The required specification / employer's requirements has been provided to bidders***

***7.1.4 A tenure blind design is expected***

***7.1.5 Affordable Housing Units – handover provisions***

***7.1.6 quality assurance testing against the Council's Employer's Requirements***

***7.1.7 Notice mechanism***

***7.1.8 Right to reject***

***7.1.9 Any other requirements.***



## Schedule 6

### Development Provisions

**[NB: this Schedule 6 will be updated to reflect bidder's proposed phasing an delivery strategy.]**

#### 1 Additional Definitions

In this Schedule 6 the following words and expressions have the meaning specified except when expressly stated to the contrary in addition to the definitions in clause 1.

**Environment** all or any of air, water and land including any within buildings and any other natural or man-made structures above or below ground;

**Environmental Law** all rules of common law, principles of equity and rules of any court or other tribunal of competent jurisdiction and all statutes relating to the protection of human health and safety, the protection of property and proprietary rights or the protection of the Environment or the generation, transportation, storage, use, treatment or disposal of Hazardous Substances;

#### 2 Construction structure

The Developer will take account of the Council's reasonable representations in respect of the Developer's proposed construction structure and method of procurement with a view to achieving optimum delivery of the Development.

#### 3 Building Contractor

3.1 The Developer will procure (in accordance with the Public Contracts Regulations 2016 where applicable), that the Building Contractor appointed under the Building Contract:

3.1.1 is substantial and reputable;

3.1.2 has (in each case) the necessary financial capacity skill and experience to enable it to perform the role of building contractor (and where the Building Contractor is to be appointed as a design and build contractor the role of a designer) on a project of a similar type size scope value and complexity to the Development; and

3.1.3 has been selected on competitive tendered rates and on terms which reflect good value for money,

and will provide a copy of any shortlist of proposed contractors to the Council for approval, such approval not to be unreasonably withheld or delayed. **[NB: preferred supply chains point to be explored during Dialogue.]**

3.2 The Developer will provide to the Council copies of the Building Contractor's costs consultants' schedules of adjusted tenders as soon as reasonably practicable.

- 3.3 As soon as it is commercially sensible so to do the Developer will work up the form and content of the proposed Building Contract and will provide a copy to the Council for approval, such approval not to be unreasonably withheld or delayed.
- 3.4 The Developer will keep the Council regularly and fully informed as to the conduct and progress of the appointment process for the Building Contractor and will give details of the Building Contractor's proposals that the Developer is proposing to accept to the Council for information.
- 3.5 The Building Contract will:
- 3.5.1 incorporate:
- (a) a defects liability period of not less than 12 months, and
  - (b) an obligation on the Building Contractor to provide a collateral warranty deed in favour of the Council in a form approved by the Council (such approval not to be unreasonably withheld or delayed) which the Developer shall procure for the Council within 28 days after the Building Contractor is obliged to provide such a warranty,
- 3.5.2 contain requirements regarding the specification and use of materials which are consistent with the relevant Strategy Documents, and
- 3.5.3 otherwise be consistent with the terms of this Agreement.
- 3.6 The Developer will supply a certified copy of the Building Contract to the Council forthwith after the same has been entered into (which copy will include details of all and any contractual possession dates agreed with the Building Contractor) and will promptly supply to the Council certified copies of material variations to the Building Contract.

#### **4 The Professional Team**

##### **4.1 Duty to appoint**

The Developer will appoint the Professional Team to advise on the Development.

##### **4.2 Council's approval of the Professional Team**

The Developer will not appoint or replace any member of the Professional Team without the prior written approval of the Council whose approval is not to be unreasonably withheld or delayed. The Council's approval is needed for both the identity of the appointee and the terms of his appointment, unless (in the case of the terms) they are substantially the same as the form of appointment annexed.

##### **4.3 Approval of appointments**

As soon as it is commercially sensible so to do the Developer will work up the form and content of the proposed appointment of each member of the Professional Team and will provide a copy to the Council for approval, such approval not to be unreasonably withheld or delayed.

#### **4.4 Replacement**

The provisions of this paragraph 4 apply to any person appointed as a replacement of any member of or addition to the Professional Team.

#### **4.5 Collateral warranties from the Professional Team**

The Developer will procure a collateral warranty in favour of the Council in a form approved by the Council (such approval not to be unreasonably withheld or delayed) from each member of the Professional Team and any other person appointed in connection with the Development who has material design responsibility for the Property. All such warranties shall be provided to the Council within 28 days of the date on which the contractor or consultant is obliged to provide them under the relevant appointment or contract.

#### **4.6 Professional indemnity insurance**

The Developer will require as a condition of appointment that each member of the Professional Team maintains professional indemnity insurance cover for so long as he retains liability for the breach of the terms of his appointment with a reputable insurer for at least £[10] million for each claim that may be made.

#### **4.7 Enforcement of terms of appointment**

The Developer will:

- 4.7.1 procure the due performance and observance of the obligations and duties of each member of the Professional Team according to his appointment;
- 4.7.2 not waive, release, vary or estop himself from enforcing or seeking redress for any obligation or duty of each member of the Professional Team without the Council's prior consent which is not to be unreasonably withheld or delayed; and
- 4.7.3 not do or omit to do anything which would entitle that member of the Professional Team to treat his appointment terminated.

#### **4.8 Design and build contracts**

If the Building Contract is on terms that the Building Contractor has a design liability:

- 4.8.1 the Developer will procure that the Building Contractor observes and performs the provisions of this paragraph 4.8 as if they had been imposed directly upon the Building Contractor; and
- 4.8.2 the Developer will procure that the terms of engagement of the Employer's Agent require the Employer's Agent to do the following:
  - (a) issue the written statement of practical completion; and
  - (b) issue a notice of making good defects; and
  - (c) fix extensions of time for completion of the Development

- (d) in accordance with the terms of the Building Contract and will act impartially and independently in doing so.

## 5 Final Scheme Layout Plan

- 5.1 The Developer will as soon as reasonably practicable following the grant of Planning Permission in consultation with the Council update the Scheme Layout Plan to reflect the final layout of the Development, as shown in the Planning Permission.
- 5.2 The parties agree and acknowledge that such updated Scheme Layout Plan, once approved by the Council under this paragraph 5 will be the Final Scheme Layout Plan for the purposes of this Agreement.
- 5.3 [ ]. ***[NB: more detail around the working up of the scheme design, spec and layout, etc.]***

## 6 Submission Plans and Viability Appraisal

6.1 [Working up the scheme.]

6.2 [Viability confirmation.]

## 7 Detailed Scheme Drawings and Variations by the Developer

- 7.1 The Developer may vary the Detailed Scheme Drawings and the Developer's Works from time to time subject to the Council's prior written approval in accordance with this paragraph 7 but will not make any variations which are inconsistent with the Planning Permission.
- 7.2 The Council will not unreasonably withhold its approval of a proposed variation which accords with the provisions of paragraph 7.1.
- 7.3 Within 5 Working Days of any approved alteration being made to the Detailed Scheme Drawings pursuant to this paragraph 7.3 the Developer will supply a copy of the updated version to the Council.
- 7.4 [ ]. ***[NB: Council to specify and specific approvals or prohibition for variations to the scheme.]***

## 8 Developer's Works

8.1 [ ]. ***[NB: Obligations relating to the Enabling Works. These are the works to be carried out and completed as part of the Development but which are being paid for by the Land Release Fund Contribution. The payment mechanism is in the main agreement.]***

### 8.2 Prior to Development

- 8.2.1 Before commencing the Developer's Works the Developer will (if it has not already done so):
- (a) procure that the Developer erects (and thereafter maintains in good order and condition throughout the period in which the Development is

being carried out) a notice board or boards indicating by means of words and symbols approved by the Council (such approval not to be unreasonably withheld or delayed) that the Development is being carried out in association with the Council,

- (b) procure that the Developer provides along or within the boundaries of the Property (and thereafter maintains in good order and condition throughout the construction period) such hoardings, fences, lights, warning signs, guards and other devices, measures and works as may be reasonably necessary for the security of the Property and the safety and convenience of the public from time to time in accordance with the requirements of the highways authority from time to time,
- (c) procure that the Developer registers the Development with the Considerate Constructors Scheme or equivalent and uses all reasonable endeavours to maintain such registration throughout the carrying out of the Development, and
- (d) prepare and submit to the Council the Target Programme (which will thereafter be updated only in order to take into account of proper extensions of time granted to the Building Contractor in accordance with the Building Contract).

### 8.3 Relevant Consents

#### 8.3.1 Developer's duty to obtain

The Developer will apply for and use all reasonable endeavours to obtain all Relevant Consents from time to time and at the appropriate times to comply with the Target Programme.

#### 8.3.2 Notification on grant

The Developer will give the Council a copy of each Relevant Consent promptly after the Developer has received it.

#### 8.3.3 Planning obligations

The Developer will, if required, negotiate the terms of planning or other obligations under Section 106 of the Town and Country Planning Act 1990, Section 38 or Section 278 of the Highways Act 1980 and Section 104 of the Water Industry Act 1991 needed to obtain the Relevant Consents but will not settle the terms of those documents without the approval of the Council. The Council will not unreasonably withhold or delay its approval of those documents.

#### 8.3.4 [ ]. **[NB: Planning Performance Agreement.]**

### 8.4 Carry out the Development

#### 8.4.1 The Developer will procure:

- (a) commencement of the Development in accordance with the Target Programme for the Development, and
- (b) that the Date of Practical Completion occurs in accordance with the Target Programme for the Development,

8.4.2 If the Developer will be prevented from commencing or proceeding with the Developer's Works in accordance with the Target Programme by reason of a Relevant Event the relevant period allowed in the Target Programme will be extended by such period as is properly attributable to such Relevant Event as properly certified by the Developer's Representative under the Building Contract or as is otherwise reasonable having regard to all the circumstances and the Target Programme will be updated accordingly.

## 8.5 Developer's obligations in relation to the Development

In carrying out the Development, the Developer will use all the reasonable skill, care and diligence expected of a competent developer experienced in carrying out work of a similar size, scope and complexity to the Development and the Developer will carry out and complete the design, construction and completion of the Development:

- 8.5.1 in a good and workmanlike manner, so it is fit for its purpose and in accordance with good building practice;
- 8.5.2 with good quality and suitable materials;
- 8.5.3 in compliance with:
  - (a) the Agreed Working Practices, the Planning Permission and all Relevant Consents;
  - (b) the obligations on the part of the Developer contained in any Planning Agreement;
  - (c) the Detailed Scheme Drawings;
  - (d) all requirements of statute;
  - (e) all requirements of the local authority;
  - (f) all relevant codes of practice, guidance, Council policies and British Standards;
  - (g) local labour requirements;
  - (h) preferred materials requirements;
  - (i) the terms of this Agreement;
  - (j) in accordance with the Target Programme; and
  - (k) [ ]; **[NB: add in the Affordable Housing requirements once fully defined]**

- 8.5.4 so that insofar as practicable the Development will continue uninterrupted (subject to any temporary cessation permitted under the Building Contract); and
- 8.5.5 so that the Developer and Sub-Contractors comply with and meet all the requirements of the Council's equality policies.

## 8.6 **Monitoring the Development**

The Developer will procure that:

- 8.6.1 all persons employed in connection with the performance of the Developer's Works will be skilled and experienced in their several professions and trades and will be adequately supervised;
- 8.6.2 all aspects of the Developer's Works will be supervised by sufficient numbers of person having adequate knowledge of such matters for the satisfactory and safe performance of the Developer's Works in accordance with this Agreement;
- 8.6.3 the Developer's Works are maintained in good order, kept in a safe condition and protected from damage, and working areas of the Property are secure against trespassers and clean and tidy so far as practicable having regard to the nature of the Developer's Works; and
- 8.6.4 adequate retaining and supporting walls are provided to support an adjoining property during the carrying out of the Developer's Works.

## 8.7 **Third party rights**

The Developer will observe and comply with any third party rights (including public rights) which may exist from time to time in respect of land comprising and adjoining the Property, and the Developer will ensure that the Developer's Works are carried out in such a way as not to interfere with access to and use and occupation of public or private roads or footpaths by any person who is entitled to any such access, use or occupation.

## 8.8 **Utilities**

The Developer will in relation to the services and utilities required or affected as a result of the carrying out of the Developer's Works:

- 8.8.1 be responsible for determining the location of such services and utilities as may be at the Property and for the maintenance of access to such services and utilities at the Property;
- 8.8.2 make and rely upon all necessary investigations and surveys as to such services and utilities at the Property;
- 8.8.3 make provision for lawfully diverting, disconnecting or otherwise dealing as may be necessary with any services and utilities not within the Property;
- 8.8.4 pay to all relevant authorities or undertakings all costs and expenses incurred in diverting, disconnecting or otherwise carrying out works in respect of such services and utilities within the Property;

- 8.8.5 make connection into services and utilities outside the Property; and
- 8.8.6 otherwise do all that is required in relation to the utilities required for the purposes of carrying out the Developer's Works.

## 8.9 Environmental and sustainability considerations and remediation

### 8.9.1 ***[NB: Site Conditions to be discussed in context of Council's existing work on environment.]***

8.9.2 The Site Conditions will be the sole responsibility of the Developer and accordingly (but without prejudice to any other obligation of Developer under this Agreement) the Developer will be deemed to have:

- (a) carried out a ground physical and geophysical investigation and to have inspected and examined the Property and their surroundings and (where applicable) any existing structures or works on, over or under the Property;
- (b) satisfied itself as to the nature of the Site Conditions, the ground and the subsoil, the form and nature of the Property, the load-bearing and other relevant properties of the Property, the risk of injury or damage to property affecting the Property, the nature of the materials (whether natural or otherwise) to be excavated and the nature of the design, works and materials necessary for the execution of the Developer's Works;
- (c) satisfied itself as the adequacy of the means and rights of access to and through the Property and accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Property);
- (d) satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Council) with access to or use of, or rights in respect of, the Property with particular regard to the owners of any land adjacent to the Property; and
- (e) satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to third parties.

8.9.3 The Developer will comply with:

- (a) the terms and recommendations set out in any report prepared under any Environmental Law relating to the Property and the Council's sustainability policy; and
- (b) best environmental practice and carry out the Development in accordance with the Environmental Laws.



## 8.10 Remediation

- 8.10.1 The Developer accepts full responsibility for all Site Conditions and the Developer will be responsible for, and hold the Council harmless from, cleaning up or otherwise dealing with any Contamination at the Property and the Developer will:
- (a) remediate or, as necessary, remove all or any Contamination in accordance with the requirements of the appropriate authority and complying with good industry practice and any applicable Environmental Law or other legislation; and
  - (b) give the Council, within ten days of a request to do so, appropriate certification that such remediation has been carried out properly.
- 8.10.2 To the extent that any part of the Property suffers from or is affected by Contamination arising from a source outside of the Property (whether or not on adjacent land) the Developer will be responsible for cleaning up or otherwise dealing with such Contamination and for preventing the recurrence of such Contamination on the Property and the Developer will clean up or otherwise deal with such Contamination and take steps reasonably necessary to prevent the recurrence of the same, all in accordance with good industry practice, Planning Permission, all Relevant Consents, Environmental Laws and other legislation.
- 8.10.3 The Developer will indemnify the Council in respect of all liability losses damages and claims incurred by the Council resulting from any Contamination on the Property or any failure to comply with Environmental Laws in procuring the Development.

## 8.11 Materials for the Development

The Developer will ensure that all materials specified and used in the Development are in accordance with:

- 8.11.1 good practice in the selection of construction materials published by the British Property Federation and the British Council of Offices;
- 8.11.2 any other codes of practice applying to the Development; and
- 8.11.3 best practice,

in each case current at the time of specification or authorisation for use and will not use any products or materials which at the time of use are known to building contractors or members of the relevant design profession within the European Union to be deleterious to health or safety or to the durability of buildings, structures, finishes or plant and machinery in the particular circumstances in which they are used.

## 8.12 Condition of the Development and the Property at practical completion

The Developer will ensure that by Practical Completion:

- 8.12.1 the Development is free from defects; and

- 8.12.2 the Development and the Property, are left in a good and clean condition cleared of all plant, equipment and unused building materials to the reasonable satisfaction of the Council.

**9 Fossils and antiques**

- 9.1 All fossils, antiques and other objects having artistic, historic or monetary value and human remains which may be found on or at the Property are or will become, upon discovery, the absolute property of the Council.
- 9.2 Upon the discovery of such item during the course of the Developer's Works, the Developer will:
- 9.2.1 immediately inform the Council of such discovery;
- 9.2.2 take all steps not to disturb the object and, if necessary, cease any Developer's Works in so far as the carrying out of such Developer's Works would endanger the object or prevent or impede its excavation; and
- 9.2.3 take all necessary steps to preserve the object in the same position and condition in which it was found.
- 9.3 The Council will promptly, and in any event within 21 Working Days issue an instruction to the Developer specifying what action the Council requires to be taken in relation to such discovery provided that if no such instruction is forthcoming within such period the Developer may continue to carry out the Developer's Works.
- 9.4 The Developer will promptly and diligently comply with any instruction issued by the Council referred to in clause 9.3 at its own cost.
- 9.5 Representatives of the Council may enter the Property for the purposes of removal or disposal of such discovery, provided that such entry will be subject to the Council complying with all relevant safety procedures and any reasonable directions with regard to site safety that may be issued by or on behalf of the Developer from time to time.
- 9.6 The Council will act promptly and diligently in dealing with its obligations in this clause **9** in relation to any find so as to mitigate any effect on the Developer or the Developer's Works.

**10 Inspection meetings etc.**

- 10.1 The Council's Surveyor and all officers and agents of the Council and other persons authorised by it and notified to the Developer and the Developer may at all reasonable times, having made prior appointment with the Developer, in the company of the Developer and/or the Developer if either or both of them so requires and at their own risk enter upon the Property to ascertain generally that the agreements contained in this Agreement are being duly observed and performed and to view the state and progress of the Developments and the materials used or intended for use but the Council will not be entitled to require the opening up or testing of the Developer's Works or any part thereof.
- 10.2 The relevant person will:
- 10.2.1 first report his or their presence to the Developer or its representatives on entering the relevant parts of the Property;

- 10.2.2 not delay, impede or obstruct or cause any disturbance to the Developer's Works;
  - 10.2.3 comply with the health and safety plan and with all proper safety and security requirements and requirements of the insurers and other reasonable restrictions imposed by the Developer; and
  - 10.2.4 not give or attempt to give instructions to the Developer or any consultant or other person.
- 10.3 If during the course of any inspection made by or on behalf of the Council pursuant to paragraph 10.1 the Council considers that any of the Developer's Works have not been or are not being carried out in accordance with the provisions of this Agreement the Council may at any time serve on the Developer a notice (**defects notice**) specifying the relevant breaches.
- 10.4 The Developer will as soon as reasonably possible procure that all such steps as may be necessary to remedy the breach to the reasonable satisfaction of the Council are taken.
- 10.5 If the Developer disagrees with the defects notice served by the Council or considers the works, materials or goods the subject of the notice to be in accordance with the Detailed Scheme Drawings, the dispute between the Developer and the Council will be referred to the Independent Person pursuant to clause 19 or, if the Developer so requires, will be determined in accordance with the disputes procedure under the relevant Building Contract.
- 10.6 Notwithstanding any rights of inspection of the Council or any other persons on the Council's behalf pursuant to paragraph 10.1 or the exercise of or failure to exercise such rights by the Council the Developer will not be relieved or excused of any liability or responsibility hereunder.
- 10.7 The Developer will convene project meetings every month with the Council for the purposes of consultation and liaison with the Council and inspecting and reviewing the progress of the Developer's Works. The Council and any representatives of the Council will be entitled to express its or their views on any matter relating to the Developer's Works to the Developer but will not give or attempt to give any instructions to any contractor or professional adviser.

## 11 **Health And Safety**

### 11.1 **Developer's general safety obligations**

At all times the Developer will comply with current health and safety legislation relating to the Development and the Developer will be responsible for the safety of any design which forms part of the Developer's Works and for the adequacy, stability and safety of all site operations and methods of construction.

### 11.2 **Developer's obligations relating to the CDM Regulations**

For the purposes of the CDM Regulations the Council and the Developer have elected that the Developer will be the only client and principal contractor for the Development and will:

- 11.2.1 keep a Planning Supervisor appointed at all times;
- 11.2.2 give the Planning Supervisor all information relevant to the Planning Supervisor's functions about the state and condition of the Development;
- 11.2.3 ensure that the Development is not commenced until the planning supervisor has been appointed, and a health and safety plan complying with the CDM Regulations has been prepared;
- 11.2.4 give the Council two copies of the completed health and safety file (including one in electronic format) which relates solely to the Development;
- 11.2.5 not withdraw, terminate or derogate from such election; and
- 11.2.6 observe, perform and discharge the obligations, requirements and duties arising under the CDM Regulations in connection with the Developer's Works.

### 11.3 **Developer's warranties about the CDM Regulations**

The Developer warrants that:

- 11.3.1 it has the competence to and has allocated and will continue to allocate adequate resources to fulfil its obligations as the only client and principal contractor for the Development in compliance with the CDM Regulations; and
- 11.3.2 all information provided by the Developer about its competence and resources and its record in health and safety is accurate and complete; and
- 11.3.3 it has fulfilled and will continue to fulfil these obligations.

## 12 **Access**

The Developer will give the Council and other persons authorised by the Council upon reasonable request the right to enter upon the Property to:

- 12.1 view the state and progress of the Development;
- 12.2 inspect and test the materials and workmanship;
- 12.3 monitor compliance by the Developer with its obligations under this Agreement; and
- 12.4 for any other purpose reasonably connected with performance of this Agreement; but
- 12.5 the Council will not in any way interfere with the Development and will comply with all health and safety and other regulations relating to the Property.

## 13 **Information**

The Developer will at the Council's reasonable request supply at its own expense:

- 13.1 copies of all surveys and reports relevant to the Property or the Development;
- 13.2 copies of any relevant correspondence with the relevant statutory service or regulatory authority about the Property and the Development and (so far as it is available) evidence

of compliance with any requirements of the relevant statutory service or regulatory authority; and

13.3 keep the Council regularly informed as to the progress of the Development.

## 14 **Development Insurance**

### 14.1 **Developer's insurance obligations**

The Developer will:

14.1.1 take out and maintain from the beginning of the Development until Completion, insurance with a reputable insurer of good repute against loss caused by:

- (a) personal injury to or death of any person because of the Developer's activities in carrying out the Development (on or off site); and
- (b) damage to any property (other than the Development and any materials, goods or equipment on site) caused by the negligence, omission or default of the Developer

for at least £[10] million for any one claim or series of claims arising out of one event;

14.1.2 give the Council within five working days of a request to do so a written confirmation from the Developer's insurers or brokers that each annual premium has been paid and a copy of the relevant renewal certificate;

14.1.3 at all times keep the structures comprising the Development insured against the Insured Risks for their full reinstatement value;

14.1.4 give the Council within five working days of the Council's reasonable request to do so a copy of any relevant insurance policies or full details of the policies and any renewal certificate;

14.1.5 ensure that insurance is maintained and contains a clause waiving the insurers' subrogation rights against the Council its employees and agents and that the Council is included in the policy as the insured;

14.1.6 not take any action or fail to take any reasonable action or permit anything to occur which would entitle any insurer to refuse to pay any claim under any insurance policy;

14.1.7 following damage to or destruction of any part of the Development, apply the proceeds of the insurance to reinstatement of that part of the Development that has been damaged and/or destroyed; and

14.1.8 pay for reinstatement to the extent there is any deficiency because the proceeds of the insurance are insufficient to cover the costs of the reinstatement required under this paragraph 14.1.

For the purposes of this Agreement **Insured Risks** includes fire, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes,

earthquake, aircraft and other aerial devices or articles dropped from them, riot and civil commotion and terrorism and such other risks as the Developer from time to time considers appropriate to include as Insured Risks to the extent that such risks can be covered at reasonable rates and reasonable commercial terms typically offered in the United Kingdom insurance markets.

#### 14.2 **Breach**

If the Developer is in breach of paragraph 14.1 the Council may pay any premiums, fees, broker's costs or other expenses required to keep such insurance in force or itself procure such insurance and may, in either case, recover such amounts from the Developer on written demand.

#### 14.3 **Notification of claims**

The Developer will give the Council notification within ten Working Days after any claim on any policy and (if required by the Council) give full details of the incident giving rise to the claim.

#### 14.4 **Limit of liability**

Neither failure to comply nor full compliance with the insurance provisions of this Agreement will limit or relieve the Developer of its other liabilities and obligations under this Agreement.

#### 14.5 **Premiums**

The insurance premiums for any insurance policy and the amount of any loss that would otherwise be recoverable under any insurance policy but for the applicable uninsured deductible and limit of indemnity in respect of such insurance will at all times be the responsibility of the Developer.

#### 14.6 **Professional indemnity insurance**

The Developer will

14.6.1 procure that the Building Contractor, Sub-Contractors and members of the Professional Team take out and maintain in force professional indemnity insurance (**PI Insurance**);

14.6.2 provide evidence satisfactory to the Council (as and when reasonably required by the Council) of the PI Insurance being in full force and effect from the date of this Agreement until the date twelve years from and including the Practical Completion Date (such evidence to include details of the cover) including confirmation of territorial limits, levels of excess, insurers, policy number and indemnity limit which shall be a minimum of £[ ] million;

14.6.3 provide the Council with notice of:

- (a) any cancellation of the PI Insurance not less than thirty days prior to the relevant cancellation date; and

- (b) any adverse material changes to or suspension of cover not less than thirty days prior to the relevant change or suspension.

14.6.4 Inform the Council as soon as reasonably practicable of any claim under the PI Insurance in respect of the Developer of in excess of £[ ] and provide such information to the Council as the Council may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit.

#### 14.7 Claims

The Developer will where it is obliged to effect insurance under this paragraph 14 not bring any claim or action against the Council in respect of any loss or damage in circumstances where the Developer is able to recover such loss or damage under such insurance (or where it would have been able to recover such loss had it been complying with its obligations under this Agreement) provided that this paragraph 14.7 will not be itself prevent the Developer from claiming against the Council for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or the extent such loss or damage exceeds the maximum level of such insurance required by this Agreement.

#### 15 Certificates of practical completion

15.1 **[NB: amend for sectional completion.]** Not less than 21 Working Days prior to the day which the Developer's Representative anticipates will be the date of issue of any Certificate of Practical Completion the Developer will procure that the Developer's Representative informs the Council's surveyor in writing that it is the Developer's Representative's intention to issue the relevant Certificate of Practical Completion on that date.

15.2 The Developer will procure that the Developer's Representative convenes a meeting with the Council, the Council's surveyor and their respective and nominated representatives at least 10 Working Days before such anticipated date in order that a joint inspection of the Development or the relevant part may be carried out with a view to considering the prospective issue of the relevant Certificate of Practical Completion.

15.3 The Developer will procure that the Developer's Representative will afford to the Council's surveyor the opportunity of making representations to him regarding the issue of the Certificate of Practical Completion at the joint inspection and require that the Developer's Representative will have due, proper and professional regard to such representations but without fettering in any way the discretion of the Developer's Representative in the issue of the Certificate of Practical Completion pursuant to the Building Contract.

15.4 Upon such anticipated date the Developer will require that the Developer's Representative either:

15.4.1 Issues the Certificate of Practical Completion of the Developer's Works or the relevant part; or

15.4.2 Issues the Certificate of Practical Completion of the Developer's Works or the relevant part but noting in writing that there are minor defects or omissions which he will set out in a snagging list or planting to be carried out in the next planting season; or

- 15.4.3 Does not issue the relevant Certificate of Practical Completion but notifies the Developer and the Council in writing of a list of items to be completed and defects to be remedied before the Developer's Representative considers that the Certificate of Practical completion can be issued.
- 15.5 If the Developer's Representative will not issue a Certificate of Practical Completion on such anticipated date, the procedure under paragraphs 15.1 to 15.4 inclusive will be repeated until the relevant Certificate of Practical Completion is issued by the Developer's Representative, save that the periods referred to in paragraphs 15.1 to 15.4 inclusive and 15.2 will be of such shorter length as is reasonable in the circumstances.
- 15.6 The Developer will procure that the Developer's Representative supplies to the Council a certified copy of any Certificate of Practical Completion within 5 Working Days of issue, together with any snagging list prepared on or following Practical Completion pursuant to paragraph 15.4.2.
- 15.7 Partial possession will not be taken of any part of the Developer's Works unless:
- 15.7.1 The relevant part or area has reached the standard which would justify the issue of a Certificate of Practical Completion under the Building Contract; and
- 15.7.2 The Developer's Representative issues the Certificate of Practical Completion in respect of such party in accordance with this paragraph 15.
- 15.8 No failure by the Council or its representatives to attend any meeting or inspection will relieve the Developer of any of its duties, obligations, responsibilities or liabilities in respect of the Developer's Works or restrict, exclude or waive or be deemed to do so any claims or actions whatsoever by the Council for any breach of such duties, obligations, responsibilities or liabilities, nor preclude or fetter the Developer's Representative from issuing the Certificate of Practical Completion.
- 15.9 Neither the Council nor its representatives will have or be deemed to have had any responsibility to the Developer or to the Developer or to any other members of the Professional Team for the design or selection of materials or the workmanship in relation to the Developer's Works by virtue of the terms or manner of operation of the provisions of this Agreement.
- 16 **Defects**
- 16.1 The Developer will within a reasonable time after the date of any Certificate of Practical Completion use all reasonable endeavours to procure the remedying of all Defects in the Developer's Works identified in the snagging list.
- 16.2 The Developer will procure that the Developer's Representative prepares and delivers to the Council in respect of all the Developer's Works not later than 30 Working Days prior to the expiry of any defects liability period specified in the Building Contract a list of Defects which have appeared in the relevant Developer's Works and which the Building Contractor may be required to remedy under the Building Contract. The Council or its representatives may, not less than 10 Working Days before the expiry of the relevant defects liability period, time being of the essence, inform the Developer of any further Defects which should be included in the list and the Developer will, if it accepts the validity of the



Council's proposals, as soon as reasonably possible use all reasonable endeavours to remedy or procure to be remedied all such Defects.

**17 Claims against the development team**

**17.1 Prosecution of claims**

If the Building Contractor or any member of the Professional Team breaches its obligations relating to the Development, the Developer will diligently prosecute claims against it for the benefit of the Council and any other person having an interest in the Property unless the Council and Developer (acting reasonably) agree that there is no reasonable prospect of success in doing so.

**17.2 Assignment of action where possible**

In respect of the [land retained by the Council pursuant to the option] the Developer will if requested by the Council assign the benefit of any ongoing claim to the extent that it may lawfully do so to the Council or to such third party as the Council may direct in writing once the Development is Practically Complete and on assignment the Developer will have no further liability under this paragraph 17.2 for that claim.

**17.3 Procedure if assignment is impossible**

If the Developer cannot lawfully assign the benefit of the claim under paragraph 17.2 then:

- 17.3.1 the Developer will continue to pursue the action for the benefit of the Council;  
and
- 17.3.2 will hold the proceeds of any claims on trust for the Council and apply them towards the cost of remedying the consequences of the original breach giving rise to the claim (where that is practicable) and otherwise pay the proceeds to the Council.

**17.4 Council's representation about claims**

The Council's may make written representations about the prosecution of any claim to the Developer to which the Developer will pay due attention.

**18 Limitation of Developer's liability**

The Developer is not released from liability for breach of obligation under this Agreement by:

- 18.1 the issue of the Certificate of Practical Completion;
- 18.2 the absence of objection by the Council to the issue of the Certificate of Practical Completion;
- 18.3 the performance of the Building Contractor of his obligations about defects liability under the Building Contract; or
- 18.4 the successful prosecution of a claim against the Building Contractor or any member of the Professional Team.

19      **Considerate Contractor's Scheme**

The Developer shall carry out the Development Works in compliance with the provisions of the Considerate Contractor's Scheme save where there shall be any conflict between the provisions of this Agreement and the provisions of the scheme the former shall prevail.

20      **Boundary Fences**

20.1      The Buyer must retain in their current position and repair and keep in good repair the fences and hoardings currently securing the Land in accordance with the Health and Safety Executive's, or other competent body's, recommendations throughout the Development.

20.2      If the Buyer shall fail to comply with the obligation in paragraph 20.1 the Agency shall have the right without notice to enter upon the Land in order to undertake such work and erect any new fencing to replace any which might be removed and the cost of all such works undertaken by the Agency (including any works of reinstatement to adjoining land) undertaken pursuant to this paragraph 20.2 shall be paid by the Buyer to the Agency on demand.

21      **Signage during construction**

21.1      Within three months of the Phase 1 Completion Date the Agency and the Buyer shall consider and agree a signage strategy in relation to the Development to be displayed on Phase 1 and/or the Land.

21.2      It is agreed that all signage to be erected on Phase 1 and/or the Land will include the name of the Agency in a prominent position and to a size not less than that of the Buyer.

21.3      The Buyer shall ensure that all promotional events for the Development are notified in writing in advance to the Agency and that marketing material in respect of the Development acknowledges the Agency's role in providing assistance and the Buyer will not issue any material until the manner in which and the wording by which such acknowledgement to be given shall have been given the prior approval by the Buyer, such approval not to be unreasonably withheld or delayed.

22      **Extensions of Time**

22.1      If the Buyer is materially delayed in completing or proceeding with the Development by reason of any of the following:

22.1.1      outbreak of war or civil insurrection involving the United Kingdom;

22.1.2      fire; tempest; frost or other insured risk;

22.1.3      any strikes or lockout in the building trade or any kindred trades;

22.1.4      any town planning or building licensing or building regulations refusal or restrictions;

22.1.5      exercise by the Council or the Agency of their rights under paragraph 18 (archaeology);

- 22.1.6 an extension, variation or alteration made to the Development which shall have been Approved by the Agency pursuant to this Agreement;
- 22.1.7 any delay by the Agency in issuing any Approval under this Agreement or
- 22.1.8 other unavoidable cause or accident beyond the control of the Buyer;

then (except where the delay has been caused by the default or negligence of the Buyer) the Agency shall allow such further time for the completion of the Development as may be reasonably claimed by the Buyer and Approved by the Agency and the Timetable shall be amended accordingly.

## 23 **Trees**

Save in accordance with the Approved Plans and subject to the Buyer obtaining all necessary consents, not to cut down or top any trees on the Land without the consent in writing of the Agency (which is not to be unreasonably withheld or delayed) which if granted may be subject to such conditions as the Agency may reasonably require.

## 24 **Gravel, etc.**

The Buyer may use for the purpose of the Development any substances which may be excavated in the proper execution of such works without making any payment for such substances to the Agency or to any person) **provided always** that where such earth, clay, gravel or sand is not required by the Buyer for the purposes of the Development the Buyer must not sell or dispose of such earth, clay, gravel or sand or permit or suffer any of the same to be removed from the Land without the prior approval of the Agency (which is not to be unreasonably withheld or delayed) and such payments received by the Buyer on its disposal shall be paid to the Agency.

## Schedule 7

### Development Surplus

**[NB: The terms of this Schedule 7 are to be developed as part of dialogue. It is anticipated that the Development Surplus will be detailed in this Agreement and Overage provisions will follow. Development Surplus must not be lower than as stated in Developer's proposals pre-contract award.]**

#### 1 Definitions

In this Schedule 7 the following words and expressions have the meaning specified except when expressly stated to the contrary:

**Affordable Units** Residential Units proposed or designated to be available to people in need or people whose incomes are insufficient to enable them to purchase or rent adequate housing or any Residential Unit where the rent is reduced directly or indirectly by means of public or private subsidy.

**Calculation Date** the [ ];

**Developer's Required Return** [ ];

**Development Surplus** the Development Surplus calculated in accordance with paragraph 2 of this Schedule 7;

**Expenditure Period** the period from the date of this Agreement up to, but not including, the Calculation Date.

**Market Value** the market value of the Property as at the Calculation Date on the basis of assumptions and requirements set out in paragraph [5] of Part 1 of this Schedule 7 and otherwise as defined in the RICS Valuation Standards Sixth Edition or as defined in the most recent subsequent edition of such Valuation Standards issued by the RICS from time to time.

**Project Expenditure** the Project Expenditure (as defined in Schedule 7 Part 2 paragraph 1) after the Project Expenses have been quantified or finally estimated in accordance with this Schedule 7.

**Project Expenses** has the meaning ascribed to it at paragraph 2 of Part 2 of this Schedule 7.

**Receipts** has the meaning ascribed to it at paragraph 3 of Part 2 of this Schedule 7.

**Sale** a disposal made by the Developer on or before the Calculation Date comprising the grant of a lease reserving a rent of less than the Market Rent of the premises comprised in the lease (and the term **Sold** is to be construed accordingly).

**Sale Proceeds** the proceeds of a Sale (exclusive of VAT) whether or not payable or paid before the Calculation Date.

**Unit** a unit of accommodation or space in the Development designed or intended for Sale.

**Unsold Residential Unit** any Residential Unit which has not been sold at the Calculation Date.

## **Part 1 - Development Surplus**

### **1 Agreement of Market Value and Development Surplus**

- 1.1 The Developer and the Council will endeavour to agree the Market Value and the Development Surplus calculated in accordance with paragraph 2 as at the Calculation Date as soon as reasonably practicable after the Calculation Date.
- 1.2 If it is not possible to fully quantify the amount of the Development Surplus on the Calculation Date because the Project Expenditure has not been fully ascertained or quantified the Developer will pay to the Council on the Calculation Date so much of the Development Surplus as may then be calculated as definitely due and also of so much as is reasonably estimated to be due.
- 1.3 If the Developer and the Council are unable to agree the Market Value or the Development Surplus pursuant to paragraphs 1.1 and 1.2 of this Part 1 of this Schedule 7, either the Developer or the Council may at any time after the Calculation Date require the Market Value or the Development Surplus to be determined in accordance with clause 19 of this Agreement provided that any such determination shall be carried out by the Independent Expert acting as expert and not as arbitrator.
- 1.4 The Development Surplus agreed or determined in accordance with this paragraph 1 will be payable by the Developer to the Council on the Calculation Date but, if the Development Surplus has not been agreed or determined pursuant to this paragraph 1 by the Calculation Date, the Development Surplus will be paid by the Developer to the Council on the date 14 working days after such agreement or determination.

### **2 Calculation of the Development Surplus**

- 2.1 The Development Surplus is a sum equal to the amount calculated in accordance with the following formula:

[ ]

**[NB: Development Surplus should not be lower than sum offered prior to Contract Award.]**

- 2.2 The specimen calculations annexed to this Agreement are worked examples of how the provisions of this Part 1 of this Schedule 7 are intended to operate and how the Development Surplus will be calculated, but the specimen calculations are specimen hypothetical figures only.
- 2.3 If there are any inconsistencies between the specimen calculations described at paragraph 2.2 and the terms of this Agreement, the terms of this Agreement will prevail.

### **3 Calculation of Market Value**

- 3.1 The assessment of Market Value is to be made on the following assumptions, whether or not fact, that:

- 3.1.1 a Certificate of Making Good of Defects and final certificate pursuant to building regulations have been issued in respect of the Developer's Works,
  - 3.1.2 all parts of the Development are fully operational,
  - 3.1.3 there are no outstanding payments due to the statutory authorities or other third parties,
  - 3.1.4 the Project Expenses have been settled and paid,
  - 3.1.5 there are no outstanding claims under any building contract or policies of insurance, and
  - 3.1.6 all payments to occupational tenants by way of incentives or other monies due under the terms of the Leases or agreements for Lease pursuant to which the Leases are to be granted have been paid and any rent free periods under the Leases have expired.
- 3.2 The assessment of Market Value will take into account:
- 3.2.1 the estimated Market Rent of:
    - (a) Unlet Units, and
    - (b) any Units which have been Let (including any likely potential increase in such Market Rent at the first rent review under the relevant Lease),
  - 3.2.2 the estimated Market Rent or Sale Proceeds for any Unsold Residential Units which are intended to be valued in accordance with paragraph 4 of Part 2 of this Schedule 7,
  - 3.2.3 the Market Value of any interest in the Affordable Units which has been or is to be retained by the Developer,
- 3.3 The assessment of the estimated **Market Rent** of any Units is to be made on the following assumptions, whether or not fact, that:
- 3.3.1 the premises being valued are ready for fitting-out by a tenant and available for immediate occupation, and
  - 3.3.2 all tenant inducements including, but not limited to, rent free periods and reverse premiums have expired or been paid as applicable,

and the estimated Market Rent is to be ascertained in accordance with professional industry valuation practice having regard to the RICS Valuation Standards Sixth Edition (or the most recent subsequent edition of such Valuation Standards issued by the RICS).

#### 4 **Good faith**

The Developer will act in good faith in carrying out its obligations under this Schedule 7.

## Part 2 - Project Expenditure

### 1 Calculation

**Project Expenditure** is the aggregate of the Project Expenses during the Expenditure Period as reduced from time to time by the Receipts during the Expenditure Period.

### 2 Project Expenses

2.1 The **Project Expenses** are all proper and reasonable costs suffered or incurred by the Developer in connection with this Agreement, any Planning Agreement (and any payments or the value of any works to be made or undertaken thereunder) the Property, the Development Works, obtaining all permissions, marketing, promoting and subsequently letting or selling the Units and the Residential Units which without prejudice to the generality of the foregoing shall include the following items incurred by the Developer:

- 2.1.1 [the cost of Acquisition of all Interests and New Rights in the Property other than Acquisitions from any Group Company of the Developer or Developer Related Party;]
- 2.1.2 the cost of extinguishment or variation of any interests or rights in over or against the Property held by a person who, by the lawful exercise of his powers, could prevent or impede the carrying out or progress of the Development or its use and enjoyment;
- 2.1.3 the cost of obtaining the Relevant Consents;
- 2.1.4 contributions, payments or costs incurred by the Developer under the terms of any Planning Agreement;
- 2.1.5 the cost of carrying out the Developer's Works including the cost of demolition, site clearance, removal of contaminated material, building and engineering works in connection with ground conditions, service diversions and all sums properly due from time to time to any contractors engaged in connected with the Development;
- 2.1.6 the fees of the Professional Team;
- 2.1.7 the cost of Sales and Lettings and attempting to Let and achieve Sales of Units including:
  - (a) payments to and the cost of works undertaken for tenants under any Leases negotiated at arm's length and in good faith; and
  - (b) the incidental advertising, marketing and promotional costs and letting agents' fees and commission;
- 2.1.8 the cost of insurance of the Developer's Works between the date of this Agreement and the grant of the Phase Transfers and against public, third party and employer's liability in respect of the Development;
- 2.1.9 output VAT properly chargeable on the Project Expenses save where a credit of input tax is available to the Developer against the output tax;

- 2.1.10 payment of any Stamp Duty Land Tax properly payable in carrying out the Development;
- 2.1.11 legal fees reasonably and properly incurred in connection with the Project Expenses.

### 3 **Receipts**

3.1 **Receipts** are the following items received by the Developer:

- 3.1.1 [any licence fees in respect of any part of the Property during the period from commencement of occupation pursuant to any Phase Licence to completion of the relevant Phase Transfer;]
- 3.1.2 premiums received on the grant of a Lease or other interest in the Property or for the surrender variation or renewal of a Lease or other interest in the Property;
- 3.1.3 rents received under any Lease or other interest in the Property including those deferred by any agreed rent free period;
- 3.1.4 Sale Proceeds in respect of any part of the Property;
- 3.1.5 sums received by the Developer in respect of any part of the Property which are in addition to Sale Proceeds;
- 3.1.6 sums received by the Developer by way of public grant;
- 3.1.7 the proceeds of any insurance policy for any Project Expenses; and
- 3.1.8 interest received on any such receipts (net of any withholding of tax to the extent that it is irrecoverable).

3.2 A Receipt is to be treated as having been received by the Developer whether they are paid to the Developer or to anyone authorised by the Developer to receive them.

### 4 **Treatment of Project Expenses**

Project Expenses incurred by the Developer during the Expenditure Period are to be included as Project Expenses even if they are quantified or ascertained only after the expiry of the Expenditure Period, subject to the provisions of paragraph 1.3 of Part 1 of this Schedule 7.

4.1 **Project Expenses** do not include:

- 4.1.1 expenditure attributable to the breach, non-observance or non-performance of the obligations of the Developer under this Agreement (but such expenditure may only be excluded to the extent that it would not have been incurred in the absence of the breach),
- 4.1.2 the [Development Surplus],



4.1.3 expenditure applicable to the Developer's participation in the bidding process subject to procurement pursuant to which this Agreement has been granted.

4.2 The Developer undertakes with the Council to:

4.2.1 include in the Project Expenses only items which properly qualify for inclusion as such and to act in good faith;

4.2.2 advise and provide details to the Council where any Project Expense is payable or paid to a Group company or a Developer Related Party,

and the Developer covenants to ensure that any such Project Expense is included only to the extent that it is included on a fair open and transparent and on an arm's length basis.

4.3 Project Expenses are allowable to the extent only that they are reasonably and properly incurred and of reasonable amount.

4.4 No item of expenditure counted under one head is to that extent to be counted under another.

4.5 Project Expenses which relate to the Property and other property are to be apportioned between the Property and the other property on a fair and reasonable basis.

4.6 References to cost include incidental costs expenses and fees incurred.

4.7 References to fees included incidental disbursements incurred.

## Schedule 8

### Project Account

#### 1 Definitions

In this Schedule 8 the following words and expressions have the meaning specified except when expressly stated to the contrary:

**Project Account** a full and proper accounting record of all Project Expenses and all Receipts, such accounting record to be maintained by or for the Developer in accordance with the terms of this Schedule 8.

**Project Cashflow** a month by month record extracted from the Project Account in respect of the Expenditure Period showing:

- (a) Project Expenses then incurred by the Developer,
- (b) Receipts then received by the Developer,
- (c) anticipated Project Expenses as at the Calculation Date, and
- (d) anticipated Receipts payable to the Developer under binding agreements relating to the Property and which have not expired or been determined,

the agreed model and methodology of which is annexed.

#### 2 Project Expenses and appraisals

The Developer is to maintain or procure the maintenance of the Project Account and record the Project Expenses and Receipts in accordance with the provisions of paragraphs 3 to 5 of this Schedule 8.

#### 3 Project Account

The Developer will:

- 3.1 on the date of this Agreement, open the Project Account;
- 3.2 from the date of this Agreement until the Calculation Date:
  - 3.2.1 credit Receipts to the Project Account, and
  - 3.2.2 debit Project Expenses to the Project Account, and
- 3.3 maintain the Project Account in a proper manner in accordance with current accounting standards and practices, and provide a copy of the then current Project Account to the Council at quarterly intervals up to the Calculation Date.

#### 4 Project Cashflow

- 4.1 The Developer and the Council agree that the form of Project Cashflow annexed to this Agreement is the current Project Cashflow as at the date of this Agreement.

4.2 The Developer will not alter the model or methodology by which the Project Cashflow is either compiled or maintained without agreement with the Council at its absolute discretion.

4.3 The Developer shall provide a copy of the Project Cashflow to the Council at quarterly intervals together with its then current estimate of the Development Surplus.

**5 Obligations of the parties at the Calculation Date**

Not less than two months prior to the Calculation Date the Developer will procure that:

5.1 the Project Account; and

5.2 the final Project Cashflow,

in each case as at the Calculation Date are prepared and submitted to the Council.

## Schedule 9

### Agreed Working Practices

#### 1 Working Practices

1.1 For the avoidance of doubt, if any of the provisions of this clause conflict with the express provisions or conditions set out in the Planning Permission then the Parties hereby acknowledge that the provisions of the Planning Permission shall prevail.

1.2 The Developer is to procure that while undertaking the construction of the Works they:

1.2.1 comply with the Code of Considerate Practice;

1.2.2 obtain and comply with all necessary skip permits and scaffold licences;

1.2.3 comply with the codes of practice set out in British Standard BS5228 (or EU equivalent) and all other accepted and appropriate working practices and any proper regulations and notices from time to time prescribed or made by any competent authority or body;

1.2.4 keep noise vibration dust mud and disturbance to a minimum and shall keep the Premises in good order and in a clean tidy condition (having regard to the Works) and shall regularly remove all refuse from the Premises;

1.2.5 comply with the reasonable requirements of:

- (a) the Council as to the siting of the points of vehicular and pedestrian access to and egress from the Premises for the Building Contractor the Consultant and all others lawfully requiring access to the Site; and
- (b) the police and the local Highways Authority in respect of the routes to be taken by vehicles serving the Premises and of the times of use of such vehicles;

1.2.6 use reasonable endeavours to ensure that:

- (a) no vehicles required in connection with the Works or the delivery or carrying away of any materials to or from the Premises park illegally outside the Premises;
- (b) no unnecessary obstruction is caused on any adjacent land or highways; and
- (c) all necessary temporary roads and pathways as the police or the local Highways Authority reasonably require to serve the site are provided;
- (d) install within the Premises and maintain in good working order proper and effective wheel washing facilities and shall (if appropriate) use the same on all vehicles before they leave the Premises;

- (e) remove all mud refuse and other debris emanating from the Premises which is deposited on any roads footpaths or other land or premises outside the Premises;
- (f) prior to the execution of any works in respect of public lighting and other communal facilities required in connection with the construction of the Works consult with the Council and obtain its prior written approval (which shall not be unreasonably withheld or delayed) and the consent of the appropriate Highway Authority (if necessary) to the form siting and fixing of the same and general arrangements relating thereto and shall execute the same as so agreed;
- (g) take all reasonable precautions to prevent unauthorised access to the Premises and to ensure that the Premises and the Works remain secure and safe;
- (h) carry out the Works in such a way that no damage is caused to any roads footpaths service media street furniture land buildings or other structures adjoining or neighbouring the Premises and as soon as reasonably practicable (or immediately in case of emergency or risk to life or limb) make good at its own expense any damage in fact caused to the Council's reasonable satisfaction.

- 1.3 put in place and observe and perform in a timely manner appropriate health and safety measures and arrangements to protect the health and safety of (and use all reasonable endeavours to avoid or mitigate any nuisance disturbance or danger to) the owners or occupiers of any adjoining or neighbouring land or buildings or to members of the public or to any person on the Premises;
- 1.4 not pollute or contaminate any sewer drain river or watercourse and shall comply with all directions recommendations and guidance given by the Environment Agency or the Council or any other competent authority or body in relation thereto;
- 1.5 not store or place on the Premises any temporary buildings materials or plant other than those reasonably necessary for carrying out the Works nor place nor store any items outside the Premises without first obtaining all requisite licences consents and approvals;
- 1.6 procure that all plant machinery and tools (including pneumatic percussion tools where permitted) shall be fitted with suitable modern silencers or muffs or shall otherwise be properly screened and shall be shut down when not in use;
- 1.7 notify the police and Council immediately of the discovery of any device or substance which the Developer suspects to be of an explosive nature and immediately cease carrying out any works in the vicinity of the device and shall co-operate with the instructions and requirements of the Council and any other competent authority in dealing with that device;
- 1.8 not to carry out any works:
  - 1.8.1 outside the hours of 7am - 7pm on Mondays to Fridays;
  - 1.8.2 outside the hours of 7am - 1pm on Saturdays;

1.8.3 on Sundays or Bank Holidays or other public holidays.

1.9 use reasonable endeavours to ensure that:

1.9.1 all traffic relating to the Premises shall approach the Premises along such routes as shall be stipulated by the Satisfactory Planning Permission or as otherwise agreed in writing between the Parties such agreement not to be unreasonably withheld or delayed;

1.9.2 no material or equipment is brought on the site except that required for the Works;

1.9.3 all surplus material is removed from the Premises when it is no longer required;

1.9.4 there is no excavation of the Premises or extraction of soil or minerals except as required for the Works;

1.9.5 there are no advertisements or signs on the Premises except for:

(a) those identifying the:

i Developer;

ii Building Contractor;

iii Professional Team;

iv Council's Solicitors and the Council's Representative;

v Developer's Solicitors and the Developer's Representative;

vi Tenants or occupiers of parts of the site (if any)

with the prior written approval of the Council (which shall not be unreasonably withheld or delayed)

(b) those reasonably required pursuant to clause [14.1.3(vii)] above;

1.9.6 the Works are carried out in a manner which does not cause any actionable nuisance, injury, danger to or interference with the public or any owners or occupiers of adjoining or neighbouring property;

1.9.7 proper provision is made for the support of land, buildings and boundaries adjoining the site and for the protection of all services benefiting land adjoining the site;

1.9.8 proper arrangements are made with the requisite authorities for the provision of water, gas, electricity, telephone and other services required for the carrying out of the Works.

1.10 Subject always to the Ancient Monuments and Archaeological Areas Act 1979:

- 1.10.1 any article of value or antiquity or any remains of geological, historical or archaeological interest on the Premises will, as between the Developer and the Council belong to the Council and if any such articles or remains are discovered, the Developer is promptly to inform the Council and comply with the Council's directions as to the inspection, protection and disposal of them;
- 1.10.2 the Developer is to take all reasonable precautions to prevent all fossils, coins, articles of value and structures and other remains or things of geological, historical or archaeological interest discovered on the site being removed, damaged or destroyed.

## Schedule 10

### Development Strategies

**Overheating Strategy** meaning the written strategy prepared by the Buyer resulting from simulation software testing within the design process to ensure that the Overheating Standards are maintained.

**Health and Safety Strategy** meaning a plan included with the Buyer's Submission showing how health and safety measures have been considered and will be implemented.

**Construction Efficiency and Quality Strategy** meaning a written statement outlining how the Buyer has used the lessons of the Design for Manufacture (£60k home) Competition and how the Buyer will use new technologies and efficiencies in the supply chain to improve the quality of the Development and delivery of high quality, more sustainable homes.

**Waste Strategy** meaning a development waste management plan produced in line with good practice published by the Waste Resources Action Programme together with the Buyer's proposals for re-use of existing materials on the land.

**Long Term Stewardship Strategy** means the Buyer's written strategy for Stewardship Governance Public Realm Social Infrastructure and Management of Public Realm and Community Facilities as these terms are more particularly defined in [Schedule 5].

**Delivery Strategy** meaning a written strategy prepared by the Buyer to include details of:

- (a) the planning programme to be adopted by the Buyer;
- (b) the preparation and submission of a Planning Application;
- (c) how the Buyer will evidence compliance with the Training Strategy and Phasing Strategy.

**Training Strategy** means the Buyer's written strategy which is to be agreed with Cornwall College Further Education Corporation for maximising the opportunities arising from (and ancillary to and as a consequence of) the Development to maximise the use of local labour.

**Phasing Strategy** means the timetable for delivery of the infrastructure required to deliver the Development in the most cost effective and efficient way and to secure the delivery of the Development as soon as practicable.



## Schedule 11

### Design and Quality Standards

#### Part 1 – Definitions

1 In this Schedule 11 the following definitions apply:

**Approved Document Part E** means the Approved Document Part E of the Building Regulations from time to time in force;

**Building for Life 12** means the minimum standard representing the national quality design standard for housing and neighbourhoods as recommend by the Building for Life partners, who include the Department of Communities and Local Government, CABI, the Home Builders Federation and the Homes and Communities Agency. It is awarded to new and refurbished housing projects and mixed use communities that demonstrate a commitment to high design standards and place-making achieving 14 of the 20 judged criteria;

**Building for Life Award** means the award by the Building for Life Scheme of a Building for Life Silver Standard for the Development;

**Category D or E Specification** means any specification or process rated as Category D or E respectively within the Green Guide for Housing Specification produced by the Building Research Establishment (current at the date of the Buyer's Submission);

**CIBSE** means Chartered Institute of Building Services Engineers;

**Green Guide** means the British Research Establishment "The Green Guide for Housing Specification" current at the date of the Buyer's Submission;

**Lifetime Homes Statement** means a statement issued by a suitably qualified person endorsed either by the Habinteg Housing Association or the Joseph Rowntree Foundation confirming that all 16 Lifetime Homes standards have been achieved;

**Overheating Standards** means in respect of Dwellings Building Regulations (Part L criterion 3);

2 **MIFA** means the minimum internal floor area (gross) in square metres of each Dwelling measured in accordance with the Code of Measuring Practice (Sixth Edition) published by The Royal Institution of Chartered Surveyors and the Incorporated Society of Valuers and Auctioneers;

**Minimum Space Requirements** means the MIFA in relation to bedrooms and occupancy of:

- (a) 1 Bed/2 person Dwelling 45m<sup>2</sup>;
- (b) 2 Bed/3 person Dwelling 66m<sup>2</sup>;
- (c) 2 Bed/4 person Dwelling 77m<sup>2</sup>;
- (d) 3 Bed/5 person Dwelling 84m<sup>2</sup>;

- (e) 4 Bed/6 person Dwelling 96m<sup>2</sup>;

**Minimum Sound Insulation Requirements** means in respect of Dwellings:

- (a) airborne sound insulation values at least that required in the Approved Document Part E; and
- (b) impact sound insulation values at least the performance standards set out in the Approved Document Part E.

## **Part 2 – Buyer covenants**

### **1 Buyer covenants**

- 1.1 The Buyer covenants that when the construction of any Dwelling has been practically completed as shall be confirmed by the issue of the CML Certificate it will notify the Agency of the same.
- 1.2 The Buyer covenants with the Agency that on practical completion of any Dwelling it will ensure that:
  - 1.2.1 the Buyer has offered and used its reasonable endeavours to enter into all requisite agreements with the highway authority pursuant to section 38 Highways Act 1980 in respect of the construction and adoption of the Adoptable Highways comprising or relating to the Development and all requisite agreements with the highway authority pursuant to section 278 of the Highways Act 1980 (as appropriate) in respect of the construction of any Highways comprising or relating to the Development and procured any bond or guarantee required by the highway authority in connection with any such agreement;
  - 1.2.2 the Buyer has offered and used its reasonable endeavours to enter into an agreement with the relevant water authority pursuant to section 104 of the Water Industry Act 1991 in respect of the construction and adoption of the sewers serving the Development and procured any bond or guarantee required by such water authority in connection with such agreement;
  - 1.2.3 the Agency has approved the Estate Layout Plan and the Buyer has lodged this at HM Land Registry; and
  - 1.2.4 (in respect of a Dwelling) the Buyer has produced to the Agency a Lifetime Homes Statement in respect of any Dwellings that require a Lifetime Homes Statement by the terms of the Satisfactory Reserved Matters Approval.

## **Part 3 – Buyer's further covenants**

- 1 The Buyer covenants with the Agency as follows:
  - 1.1 to promptly following practical completion of 50% (fifty per cent) (by number) of the Dwellings intended to be constructed within each Phase of the Development apply for a Building for Life Award and will thereafter diligently pursue the award of the same and shall promptly keep the Agency advised of the progress of its application and promptly supply a copy of such award once made;

- 1.2 to obtain following practical completion of each relevant Dwelling a Lifetime Homes Statement in respect of the Dwellings that require a Lifetime Homes Statement by the terms of the Satisfactory Reserved Matters Approval;
- 1.3 to deliver the Minimum Space Requirements for each Affordable Dwelling comprised in the Development; and
- 1.4 the Buyer shall deliver the Overheating Standards for each Dwelling in accordance with the Overheating Strategy forming part of the Development Strategies.

**Schedule 12**  
**Handover List**

**Annexure 1**

**The Tender Submission**

## Annexure 2

[ ]