

# Planning Obligation by Deed of Agreement under Section 106 of the Town and Country Planning Act 1990

relating to [the development of .....  
on/at ..... ]

Dated : 201...

- [Local Planning Authority] (1)
- [Local Highway Authority] (2)
- [Freeholder] (3)
- [Other Interested Person] (4)
- [Other Interested Person] (5)

1

---

1 **GENERAL GUIDANCE NOTE**

*The objective is to provide a document which is concise, clear and comprehensive. Modern legal drafting no longer employs archaic legal terminology. Instead, it should be drafted so as to be readily understood by all interested parties.*

*The solicitors responsible for drafting the document need to receive clear and unambiguous instructions from their clients.*

*A Section 106 Planning Agreement is a legal document. It creates legal commitments which bind the original parties and their successors, and the land, and these commitments may continue for many years. It is important to remember that a Section 106 Planning Agreement will usually be negotiated in conjunction with the planning permission, which also normally runs with the land.*

*The document should follow a logical sequence, starting with the parties followed by an Introduction which explains the objective of the Planning Agreement, then the legal provisions that enable the local planning authority and any other public authority to enter into the planning obligations, and the operative provisions containing the obligations of the landowner and, if appropriate, the local authorities.*

*A Unilateral Obligation may be employed where the obligations are made by the Owner and/or the Developer without any reciprocal commitments by the local planning authority, provided that the local planning authority by whom the Planning Obligation is enforceable is identified within the Deed.*

*The parties negotiating the Agreement are encouraged to follow the broad format of this agreement. Where necessary, however, they may substitute the provisions (especially those in square brackets) in this standard agreement for wording specific to the development and authority. Authorities should make standard materials available to applicant.*

---

*Regulation 122 of the Community Infrastructure Regulations 2010 states that a planning obligation may only constitute a reason for granting planning permission for a development if the obligation is (a) necessary to make the development acceptable in planning terms, (b) directly related to the development and (c) fairly and reasonably related to the development. It appears that “development” in this context means anything done by way of or for the purpose of the erection of a new building or anything done in respect of an existing building (Regulation 2(2)).*

*Regard should also be had to Regulation 123(2). A planning obligation which provides funding or provision of “relevant infrastructure (see Regulation 123(4) for definition) cannot constitute a reason for grant to the extent it funds or provides relevant infrastructure. This takes effect on the date an authority’s charging schedule first takes effect.*

*Regulation 123(3) contains elaborate anti-tariff provisions designed to stop s.106 agreements being used for tariffs. They also come into effect when a charging schedule comes into effect, or, if earlier, 6 April 2014.*

*Again, in Regulation 123, “development” is defined specially – see Regulation 2(2).*

*Public Procurement. There have been concerns expressed since the decision of the ECJ in Auroux v Roanne [2007] EUECJC – 220/05 about the application of public procurement law to s.106 agreements. In general, these do not appear to have led to standardised drafting changes. Councils and landowners appear to have taken a case by case approach. The recent case of Helmut Muller v Bundenansalt fur Immobilienantgaben [2010] EUECT C-451/08 may have eased the position. The drafting in this edition has not specifically addressed either case and practitioners are recommended to continue the pragmatic and careful case by case approach currently adopted.*

## TABLE OF CONTENTS

INTRODUCTION .....	1
1 DEFINITIONS .....	2
2 CONSTRUCTION OF THIS DEED.....	3
3 LEGAL BASIS.....	4
4 CONDITIONALITY.....	4
5 THE OWNER'S COVENANTS .....	4
6 THE COUNCIL'S COVENANTS.....	5
7 THE COUNTY COUNCIL'S COVENANTS .....	5
8 MISCELLANEOUS .....	5
9 MORTGAGEE'S CONSENT.....	6
10 WAIVER.....	6
11 CHANGE IN OWNERSHIP.....	6
12 INDEXATION .....	6
13 INTEREST .....	6
14 VAT .....	6
15 DISPUTE PROVISIONS.....	7
16 JURISDICTION.....	7
17 DELIVERY .....	7
FIRST SCHEDULE [Details of the Owner's Title, and description of the Site] .....	8
SECOND SCHEDULE [Form of notice of planning permission].....	9
THIRD SCHEDULE The Owner's Covenants with the Council .....	10
CCTV .....	14
Affordable Housing : Version One.....	15
Affordable Housing : Version Two.....	18
Schedule P : Tender Procedure .....	29
Schedule Q : Optimum size and tenure mix.....	30
Affordable Housing : Version Three .....	32
Public Art .....	37
Highway Works .....	38
Transport Contribution.....	39
FOURTH SCHEDULE The Owner's Covenants with the County Council.....	43
FIFTH SCHEDULE Council's Covenants.....	44
SIXTH SCHEDULE County Council's Covenants.....	45

SEVENTH SCHEDULE Contract and Land Transfer .....	46
EIGHTH SCHEDULE Highways Agreement.....	47
NINTH SCHEDULE Specification for Community Facilities Floorspace.....	58
ANNEXE A : Affordable Housing Drafting Notes .....	60

DATE 200...

PARTIES <sup>2</sup>

- (1) [LOCAL PLANNING AUTHORITY] of [.....insert address.....]  
("Council")
- (2) [LOCAL HIGHWAY AUTHORITY] of [.....insert address.....]  
("County Council")<sup>3</sup>
- (3) [FREEHOLDER] of [.....insert address.....]  
("Owner")
- (4) [OTHER INTERESTED PERSON] of [.....insert address.....]  
("Developer")
- (5) [OTHER INTERESTED PERSON] of [.....insert address.....]  
("Mortgagee")

INTRODUCTION<sup>4</sup>

- 1 The Council is the local planning authority for the purposes of the Act for the area in which the Site is situated.
- 2 The County Council is the local highway authority, [and the county planning authority / the education authority] for the area in which the Site is situated.
- 3 The Owner is the freehold owner of the Site.<sup>5</sup>
- 4 The Developer is <sup>6</sup>
- 5 The Mortgagee is <sup>7</sup>

---

<sup>2</sup> *These are the parties who should sign the document as being interested in the land, where, "interested" has a legal meaning. The parties usually include the freeholder, any lessee(s), and the purchaser of the development site with a contract conditional upon obtaining planning permission or an option for a period of time within which the developer may obtain planning permission and then decide whether or not to purchase the land.*

**Local Planning Authority** – the local authority for the area where the land is situated; this may be the District Council Unitary authority, London Borough, National Park Authority or Urban Regeneration Agency.

**County Council** – a County Council may also be joined as a party in its role as local highway authority and/or local education authority or local planning authority.

**Mortgagee** - In an event of a default by the mortgagor, the mortgagee may take possession of the land, and therefore be liable for the commitments in the planning obligation.

<sup>3</sup> *In unitary areas, the unitary authority will have eg the education and (for non-trunk roads) highway authority powers. Thus the agreement will need to be modified when used in such areas essentially to substitute the Council for the County, making it clear in the recitals that the Council has the County functions.*

<sup>4</sup> *This section is also known as "Recitals", sets the scene for the obligations which appear later in the Agreement. The relevant role(s) of the County Council should be identified.*

<sup>5</sup> *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

<sup>6</sup> *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

<sup>7</sup> *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

- 6 The Owner has submitted the Application to the Council and the parties have agreed to enter into this Deed in order to secure the planning obligations contained in this Deed.
- 7 The Council resolved on [...insert date...] to grant the Planning Permission subject to the prior completion of this Deed.

NOW THIS DEED WITNESSES AS FOLLOWS:

**OPERATIVE PART<sup>8</sup>**

**1 DEFINITIONS<sup>9</sup>**

For the purposes of this Deed the following expressions shall have the following meanings:

- |                               |   |
|-------------------------------|---|
| “1980 Act”                    | the Highways Act 1980.  |
| “Act”                         | the Town and Country Planning Act 1990.   |
| “Agreement”                   | an agreement with a transfer annexed in the form set out and completed in accordance with the Seventh Schedule.   |
| “Application”                 | the application for outline [full] planning permission dated [ ] submitted to the Council for the Development and allocated reference number [ ].   |
| “Chargee”                     | any mortgagee or charge of the Registered Social Landlord or the successors in title to such mortgagee or charge or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925.  |
| “Commencement of Development” | the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development begins to be carried out other than (for the purposes of this Deed and for no other purpose) operations consisting of site clearance, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements and “Commence Development” shall be construed accordingly. |

---

<sup>8</sup> *These are the provisions that follow the recitals and which set out:*

- (a) *the method and means of performance of the obligations,*
- (b) *the content of the obligations.*

<sup>9</sup> *Modern draftsmen include their definitions at the beginning of the operative part of the Deed, unless the document is short. A defined term should be given a capital letter wherever it subsequently appears in the document. The purpose of definitions is to remove ambiguity, and to avoid unnecessary repetition. Other definitions can be added, depending upon the terms of the obligations.*

“County Engineer”[“Director”]	the Director of Engineering or his appointed representative for the time being of the County Council.
“Development”	the Development of the Site with [... <i>insert description of the development...</i> ] as set out in the Application.
“Dwelling”	any dwelling (including a house flat or maisonette) to be constructed pursuant to the Planning Permission.
“Highways Agreement”	an agreement for [... <i>insert purposes...</i> ] substantially in the form set out in the Eighth Schedule with such amendments as may be agreed between the parties thereto.
“Index” <sup>10</sup>	All Items Index of Retail Prices issued by the Office for National Statistics [All In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors or any successor organisation].
“Interest”	interest at [       ] per cent above the base lending rate of the [       ] Bank Plc from time to time.
“Occupation” and “Occupied”	occupation for the purposes permitted by the Planning Permission but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations.
“Plan”	the plan attached to this Deed.
“Planning Permission”	the outline [full] planning permission subject to conditions to be granted by the Council pursuant to the Application as set out in the Second Schedule.
“Property Transfer Trigger”	the restriction on occupation of more than [... <i>specify no. of dwellings/square metres as applicable...</i> ] set out in paragraph [1] of the Third Schedule. <sup>11</sup>
“Site” <sup>12</sup>	the land against which this Deed may be enforced as shown edged red on the Plan <sup>13</sup> .

## 2 CONSTRUCTION OF THIS DEED

- 2.1 Where in this Deed reference is made to any clause, paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule or recital in this Deed.
- 2.2 Words importing the singular meaning where the context so admits include the plural meaning and vice versa.

---

<sup>10</sup> *The choice of index will depend on what is being indexed. More than one index may need to be specified.*

<sup>11</sup> *Needed if property to be transferred.*

<sup>12</sup> *This will usually be the same as the application site. It should be the land against which the obligations are to be enforced.*

<sup>13</sup> *This will usually be the same as the application site.*

- 2.3 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeable in that manner.
- 2.4 Wherever there is more than one person named as a party and where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and severally unless there is an express provision otherwise.
- 2.5 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it.
- 2.6 References to any party to this Deed shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Council and County Council the successors to their respective statutory functions.
- 2.7 The headings and contents list are for reference only and shall not affect construction.

### **3 LEGAL BASIS<sup>14</sup>**

- 3.1 This Deed is made pursuant to Section 106 of the Act [Section 111 of the Local Government Act 1972 and Section 2 of the Local Government Act 2000]<sup>15</sup>.
- 3.2 The covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations pursuant to Section 106 of the Act and are enforceable by the Council [and County Council in the case of covenants made with them] as local planning authority[ies] against the Owner.<sup>16</sup>

### **4 CONDITIONALITY**

This Deed is conditional upon:

- (i) the grant of the Planning Permission; and
- (ii) the Commencement of Development

save for the provisions of Clauses 8.1, 11, 15, 16 and 17 [add any other relevant provisions] which shall come into effect immediately upon completion of this Deed.

---

<sup>14</sup> *The operative provisions should follow a logical sequence, commencing with a statement of the legal powers which are relied upon by the local planning authority when entering into this agreement. Obviously, the primary authority is Section 106 of the Town and Country Planning Act 1990, but the local planning authority may also wish to include Section 111 of the Local Government Act 1972, and Section 2 of the Local Government Act 2000. Sections 111 and 2 should be mentioned where the local planning authority is also committing to carrying out certain actions. These sections enable the local authority to deal with obligations required from the landowner, that are not within the powers of Section 106. However, unlike s.106, obligations under section 111 and 2 do not run with the land.*

<sup>15</sup> *An agreement under s.106 can be modified under s.106A and s.106B. If the agreement is also made under other powers, draftsmen may wish to include similar provisions for covenants under those other powers.*

<sup>16</sup> *Standard Terms  
Formal requirement  
It is necessary to state formally that the document is a planning obligation for the purposes of Section 106 of the Town and Country Planning Act 1990.*

## **5 THE OWNER'S COVENANTS**

5.1 The Owner covenants with the Council as set out in the Third Schedule.

5.2 The Owner covenants with the County Council as set out in the Fourth Schedule.

## **6 THE COUNCIL'S COVENANTS**

6.1 The Council covenants with the Owner as set out in the Fifth Schedule.

## **7 THE COUNTY COUNCIL'S COVENANTS**

7.1 The County Council covenants with the Owner as set out in the Sixth Schedule.

## **8 MISCELLANEOUS**

8.1 The Owner shall pay to the Council on completion of this Deed the reasonable legal costs of the Council incurred in the negotiation, preparation and execution of this Deed.

8.2 No provisions of this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999

8.3 This Deed shall be registrable as a local land charge by the Council.

8.4 Where the agreement, approval, consent or expression of satisfaction is required by the Owner from the Council or County Council under the terms of this Deed<sup>17</sup> such agreement, approval or consent or expression of satisfaction shall not be unreasonably withheld or delayed and any such agreement, consent, approval or expression of satisfaction shall be given on behalf of:

(i) the Council by the Head of Development and Building Control;

(ii) the County Council by the County Director<sup>18</sup>

And any notices shall be deemed to have been properly served if sent by recorded delivery to the principal address or registered office (as appropriate) of the relevant party.

8.5 Following the performance and satisfaction of all the obligations contained in this Deed the Council shall forthwith effect the cancellation of all entries made in the Register of Local Land Charges in respect of this Deed.

8.6 Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed.

8.7 This Deed shall cease to have effect (insofar only as it has not already been complied with) if the Planning Permission shall be quashed, revoked or otherwise withdrawn or (without the consent of the Owner) it is modified by any statutory procedure or expires prior to the Commencement of Development.

8.8 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Site but without prejudice to liability for any subsisting breach arising prior to parting with such interest.

8.9 This Deed shall not be enforceable against owner-occupiers or tenants of dwellings constructed pursuant to the Planning Permission nor against those deriving title from them.<sup>19</sup>

---

<sup>17</sup> *Making this reciprocal*

<sup>18</sup> *These references will need to be tailored to the authority and agreement, and the potential for job titles to change borne in mind.*

- 8.10 Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this Deed.
- 8.11 Nothing contained or implied in this Deed shall prejudice or affect the rights discretions powers duties and obligations of the Council [and County Council] under all statutes by-laws statutory instruments orders and regulations in the exercise of their functions as a local authority.

## **9 MORTGAGEE'S CONSENT**

- 9.1 The Mortgagee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Site shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner.

## **10 WAIVER**

No waiver (whether expressed or implied) by the Council [(or the County Council or Owner)] of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council [(or the County Council or Owner)] from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

## **11 CHANGE IN OWNERSHIP**

The Owner agrees with the Council to give the Council [and County Council] immediate written notice of any change in ownership of any of its interests in the Site occurring before all the obligations under this Deed have been discharged such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Site or unit of occupation purchased by reference to a plan.<sup>20</sup>

## **12 INDEXATION**

Any sum referred to in the Third [and Fourth] Schedule[s] shall be increased by an amount equivalent to the increase in the Index from the [date hereof]<sup>21</sup> until the date on which such sum is payable.

## **13 INTEREST**

If any payment due under this Deed is paid late, Interest will be payable from the date payment is due to the date of payment.

## **14 VAT**

All consideration given in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable.<sup>22</sup>

---

<sup>19</sup> Some parts of a planning agreement will need to be enforceable against owner occupiers or tenants, eg some affordable housing provisions. Consider whether this common exclusion is suitable for all parts of the agreement.

<sup>20</sup> Consider whether sales to owner occupier and business tenancies are to be notified. The purpose of this clause is to assist the LPA in practical monitoring. Consider also including a clause on service of notices.

<sup>21</sup> Insert appropriate point.

<sup>22</sup> Parties should take advice on the applicability of VAT and consequences of failure to collect if payable.

## **15 DISPUTE PROVISIONS<sup>23</sup>**

- 15.1 In the event of any dispute or difference arising between [any of] the parties to this Deed in respect of any matter contained in this Deed such dispute or difference shall be referred to an independent and suitable person holding appropriate professional qualifications to be appointed (in the absence of an agreement) by or on behalf of the president for the time being of the professional body chiefly relevant in England with such matters as may be in dispute and such person shall act as an expert whose decision shall be final and binding on the parties in the absence of manifest error and any costs shall be payable by the parties to the dispute in such proportion as the expert shall determine and failing such determination shall be borne by the parties in equal shares.
- 15.2 In the absence of agreement as to the appointment or suitability of the person to be appointed pursuant to Clause 15.1 or as to the appropriateness of the professional body then such question may be referred by either part to the president for the time being of the Law Society for him to appoint a solicitor to determine the dispute such solicitor acting as an expert and his decision shall be final and binding on all parties in the absence of manifest error and his costs shall be payable by the parties to the dispute in such proportion as he shall determine and failing such determination shall be borne by the parties in equal shares.
- 15.3 Any expert howsoever appointed shall be subject to the express requirement that a decision was reached and communicated to the relevant parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than twenty-eight working days after the conclusion of any hearing that takes place or twenty-eight working days after he has received any file or written representation.
- 15.4 The expert shall be required to give notice to each of the said parties requiring them to submit to him within ten working days of notification of his appointment written submissions and supporting material and the other party will be entitled to make a counter written submission within a further ten working days.
- [15.5 The provisions of this clause shall not affect the ability of the Council or County Council to apply for and be granted any of the following: declaratory relief, injunction, specific performance, payment of any sum, damages, any other means of enforcing this Deed and consequential and interim orders and relief.]

## **16 JURISDICTION**

This Deed is governed by and interpreted in accordance with the law of England and Wales and the parties submit to the non-exclusive<sup>24</sup> jurisdiction of the courts of England and Wales.

## **17 DELIVERY**

The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

IN WITNESS whereof the parties hereto have executed this Deed on the day and year first before written.

---

<sup>23</sup> Consider whether this is desirable to replace (wholly or in part) recourse to the courts. See also clause 15.5 whose effect may negate this clause. Consider also whether to choose arbitration or expert determination. Consider also making only specific parts of the agreement subject to dispute resolution.

<sup>24</sup> Non-exclusive jurisdiction ensures that foreign courts are not excluded from enforcing judgments.

FIRST SCHEDULE<sup>25</sup>

**[Details of the Owner's Title, and description of the Site]**

---

<sup>25</sup>

*Description of the title and the land to be bound by the Agreement. This is usually a description of the development site which is the subject of the application for planning permission.*

SECOND SCHEDULE<sup>26</sup>

**[Form of notice of planning permission]**

---

<sup>26</sup>

*Form of notice of planning permission. Whilst the notice of planning permission will only be issued upon the completion and exchange of the signed Section 106 Planning Obligation, good practice is to annex a draft to the document so that all terms and conditions are known.*

## THIRD SCHEDULE

### The Owner's Covenants with the Council

#### Transfer of property/open space/play areas/public squares/amenity space<sup>27</sup>

##### Definitions (to be included in Clause 1):

"Open Space Land"	means the land shown for identification purposes coloured [ ] on the Plan
"Open Space Works"	works to be carried out under paragraph [ ] to the Third Schedule in accordance with the Open Space Works Specification
"Open Space Works Specification"	a specification for the carrying out of Open Space Works and the maintenance specification to be agreed in writing between the Owner/Developer and the Council prior to Commencement of the Development
"Open Space Contribution"	means the sum of £..... towards the provision and/or improvement of open space facilities payable in accordance with paragraph 1 of the Third Schedule

27

##### **Transfer of property**

*It is often necessary to provide for the transfer of property as a precondition of the grant of planning permission. (Note however that planning obligations cannot be used to deliver payments in kind under CIL – see CIL Regulations 2010, Regulation 73(7).) For example, there may be play areas to be created in a residential development which the Council requires, or a community centre or public open space. Affordable housing usually also requires land to be transferred to a Registered Social Landlord. Section 106 does not expressly contemplate the transfer of land. Accordingly, either there must be a contract for the sale of land, which can be incorporated in the same document but made under other powers, or a restriction on the use or development of land must be imposed until the land has been transferred. In that case, the Owner will often wish to establish the terms for the transfer and have a commitment from the Council to acquire the land at the appropriate time, so as not to be prevented from continuing with the development should the Council fail to complete the transfer. Those provisions will constitute a contract for the sale of land and must therefore comply with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 and will need to be registered as an estate contract. The example clauses also address the situation where the transferee has yet to be identified.*

*LPAs may wish to secure areas of land to be retained for public use as amenity areas through a planning agreement. This model agreement cannot address drafting for all of them. They include:*

- an area of Open Space to be dedicated for public use can be specified without identification of its exact location on the Site, but with a mechanism for its later determination*
- a specified area of the Development Site may be identified within the overall site and dedicated for public use with or without a financial contribution towards its subsequent maintenance*
- a specified area of the Development Site may be identified laid out as open space to a defined specification and dedicated for public use*
- a financial contribution may be payable to the local planning authority for provision of off-site open space, or improvement and maintenance of existing open space within a defined proximity to the Development Site, and with a positive obligation by the local planning authority to use the monies within a specified period of time, otherwise such monies or the balance of such monies should be returned to the Developer.*

*In all cases care should be taken to ensure the obligations will run with the land.*

**A Where property to be transferred to Council**

- 1 No more than [...specify no. of dwellings/square metres as applicable...] within the Development shall be Occupied unless the Owner shall have transferred to the Council the Open Space Land on the terms set out in the Seventh Schedule<sup>28</sup> and paid the Open Space Contribution to the Council
- 2 Prior to the transfer referred to in paragraph 1 the Owner shall carry out the Open Space Works to the satisfaction of the Council<sup>29</sup>

**B Alternative approach where property is to be transferred to the Council**

- 1 The Owner and the Council hereby agree as follows:
- 1.1 The Owner shall sell and the Council shall buy the Open Space Land on the terms set out in the Seventh Schedule<sup>30</sup>
- 1.2 Completion of the transfer of the Open Space Land referred to in paragraph 1.1 above shall take place on or before Occupation of [...specify no. of dwellings/square metres as applicable...] within the Development

**C Where the transferee of land has not been identified; this is often the case for example where the land is for a nature reserve or affordable housing**

- 1 No more than [...specify no. of dwellings/square metres as applicable...] within the Development shall be occupied unless prior thereto the Owner shall (by signing and sending the Agreement to the Transferee) offer to sell to the Transferee the Open Space Land which offer may be accepted by the Transferee signing and returning the Agreement to the Owner within [...specify appropriate period...] from the date of the offer in respect of which time shall be of the essence<sup>31</sup>

---

<sup>28</sup> *The Seventh Schedule should set out the conveyancing terms of the sale, title, price which (will usually be a nominal amount), any provisions needed for decontamination and environmental liability, any commuted sum to be paid to the Council and the terms of the transfer. It must comply with s.2 Law of Property (Miscellaneous Provisions) Act 1989. Under this approach the restriction in this paragraph is within section 106(2) with a contract for the purchase of land which can be protected by registration at the Land Registry. This contract in the Seventh Schedule should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.*

<sup>29</sup> *If B or C is adopted, similar wording for Open Space Works and Open Space Contribution may be included.*

<sup>30</sup> *Again, the Seventh Schedule should set out the terms and the transfer. Under this approach, an estate contract is created by paragraph 1 which can be protected by registration at the Land Registry. This approach is not within the powers of section 106 and should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.*

<sup>31</sup> *Under this approach, a restriction within s.106(2) is created. The Seventh Schedule will set out the contract and transfer.*

## Community Facilities<sup>32</sup>

**Definitions** (to be included within clause 1):

“Community Facilities Land”	means the site of the Community Facilities shown for identification purposes only coloured [ ] on the Plan having an area of [ ] hectares and referred to in paragraph [ ] of the Third Schedule
“Community Facilities”	means the provision of a community hall/[health centre as shall be agreed with the local planning authority, as provided in paragraph [ ] of the Third Schedule
“Community Facilities Floorspace”	means not less than [ ] square metres of floorspace (gross external) to be provided within the Development for the purposes referred to in paragraph [ ] of the Third Schedule in accordance with the Specification
“Community Facilities Contribution”	means the sum of [ ] pounds (£[.....]) towards the provision of the Community Facilities
“Community Uses”	means [.....]
“Specification”	means the specification set out in the Ninth Schedule

- 2 The Owner [and/or the Developer] covenants and agrees:
- 2.1 to provide and lay out (including construction of buildings to at least a shell state) the Community Facilities Land in accordance with the Specification and to the Council’s satisfaction for the purpose of accommodating the Community Facilities
- 2.2 to complete the works of provision and laying out on or before [...specified number...] Dwelling[s] [is/are] made available for occupation
- 2.3 The Community Facilities Land shall only be used for one or more of the Community Uses
- OR
- 2.1 to provide the Community Facilities Floorspace in the following phases:
- (a) not to Occupy more than [...specified number...] Residential Units until [...specified area...] square metres of Community Facilities Floorspace has been provided
- (b) not to Occupy [...specified number...] Residential Units until [...specified number...] square metres of Community Facilities Floorspace has been provided

---

<sup>32</sup> Generally, where a large residential development is to be carried out, some social infrastructure may be necessary. If it is necessary to secure those by the planning agreement (remember that conditions should be considered first) standard clauses are provided. In this example, Community Facilities can include a community hall, a health centre or cultural facilities, such as a library. The Community Facilities can be provided in a number of ways, for example:

- (i) identification of a site within the overall Development Site, with its subsequent transfer to the local planning authority, or other identified body;
- (ii) identification of site and construction at the Owner’s expense of necessary buildings;
- (iii) financial contribution;

Where the facilities are to be transferred to the LPA, use the provisions in paragraph 1.

2.2 The Community Facilities Floorspace shall only be used for one or more of the Community Uses

## CCTV<sup>33</sup>

**Definitions** (to be included in clause 1):

- “CCTV” means closed circuit television covering the [...*specify public areas...*] to be provided in accordance with paragraph [ ] of the Third Schedule
- “CCTV Contribution” means the sum of [...*specify amount...*] indexed to be paid by the Developer/the Owner to the Council and expended by the Council in accordance with paragraph [ ] of the Third Schedule
- “Public Realm” means the areas open to the public [*within the town centre*] which shall be subject to surveillance by CCTV

3 Prior to the Commencement of the Development the Developer shall agree with the Council a detailed scheme for the installation of CCTV to monitor the [...*specify areas...*] [the Public Realm] which scheme shall include details of:

- (a) the number and location of the CCTV cameras to be installed;
- (b) the specification of the CCTV cameras to be installed which shall be of similar standard to that of the Council's cameras
- (c) phasing of the installation

and shall thereafter install the CCTV in accordance with the agreed scheme [and connect it to the Council's existing CCTV system]<sup>34</sup>

OR

3 Prior to the Commencement of the Development the Developer shall pay the CCTV Contribution to the Council which shall be used by the Council to increase the CCTV monitoring capacity within the Public Realm

---

<sup>33</sup> With urban development sites it may be appropriate to seek a contribution towards street safety by means of the provision of CCTV.

<sup>34</sup> Developers may wish to have covenants from the Council to permit connection and to transfer ownership to the Council.

## Affordable Housing<sup>35</sup>

### VERSION ONE

#### Definitions (to be included in clause 1)

<b>“Affordable Housing”</b>	subsidised housing that will be available to persons who cannot afford to rent or buy housing generally available on the open market;
<b>“Affordable Housing Units”</b>	that part of the Development comprising [.....] residential units [...describe mix of units...] together with [.....] car parking spaces shown on drawing numbers [ <i>drawing references</i> ]; or any one or more of them
<b>“Chargee”</b>	any mortgagee or chargee of the Registered Social Landlord or the successors in title to such mortgagee or chargee or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925 <sup>36</sup> ;
<b>“Chargee’s Duty”</b>	the tasks and duties set out in paragraph 4.4 to the [Affordable Housing] Part of the Third Schedule
<b>“Market Housing Units”</b>	that part of the Development which is general market housing for sale on the open market and which is not Affordable Housing;
<b>“Practical Completion”</b>	issue of a certificate of practical completion by the Owner’s architect or in the event that the Development is constructed by a party other than the Owner the issue of a certificate of practical completion by that other party’s architect;
<b>“Protected Tenant”</b>	any tenant who:  (a) has exercised the right to acquire pursuant to the Housing Act 1996 or any statutory provision for the time being in force (or any equivalent contractual right) in respect of a particular Affordable Housing Unit  (b) has exercised any statutory right to buy (or any equivalent contractual right) in

---

<sup>35</sup> See also the Affordable Housing Drafting Notes.

<sup>36</sup> This is a mortgagee of the RSL’s interest, not a mortgagee of an the interest of a shared owner of an Affordable Housing Unit

respect of a particular Affordable Housing Unit

- (c) has been granted a shared ownership lease by a Registered Social Landlord (or similar arrangement where a share of the Affordable Housing Unit is owned by the tenant and a share is owned by the Registered Social Landlord) by the Registered Social Landlord in respect of a particular Affordable Housing Unit and the tenant has subsequently purchased from the Registered Social Landlord all the remaining shares so that the tenant owns the entire Affordable Housing Unit;

**“Registered Social Landlord”**

a registered social landlord as defined in Part 1 of the Housing Act 1996 who is registered with the Housing Corporation<sup>37</sup> pursuant to Section 3 of that Act and has not been removed from the register pursuant to Section 4 of that Act and who is approved by the Council (such approval not to be unreasonably withheld or delayed).

**4 Affordable Housing**

- 4.1 Subject to the provisions of this paragraph 4 no more than [ %] of Market Housing Units shall be Occupied until all of the Affordable Housing Units have been constructed in accordance with the Planning Permission and made ready for residential occupation and written notification of such has been received by the Council.
- 4.2 Subject to the provisions of this paragraph 4 from the date of Practical Completion of the Affordable Housing Units they shall not be used other than for Affordable Housing other than by:
  - 4.2.1 any Protected Tenant or any mortgagee or chargee of the Protected Tenant or any person deriving title from the Protected Tenant or any successor in title thereto and their respective mortgagees and chargees; or
  - 4.2.2 any purchaser from a mortgagee of an individual Affordable Housing Unit pursuant to any default by the individual mortgagor.
- 4.3 Subject to the provisions of this paragraph 4 no more than [...insert %...] of the Market Housing shall be Occupied until the Affordable Housing Units have been transferred to the Registered Social

---

<sup>37</sup> See the Affordable Housing Drafting Notes

Landlord on terms that accord with relevant Housing Corporation<sup>38</sup> funding requirements current at the date of construction of the Affordable Housing Units.<sup>39</sup>

4.4 Any Chargee shall prior to seeking to dispose of the Affordable Housing Units pursuant to any default under the terms of its mortgage or charge shall give not less than [ ] months' prior notice to the Council of its intention to dispose and:

- (a) in the event that the Council responds within [ ] months from receipt of the notice indicating that arrangements for the transfer of the Affordable Housing Units can be made in such a way as to safeguard them as Affordable Housing then the Chargee shall co-operate with such arrangements and use its best endeavours<sup>40</sup> to secure such transfer
- (b) if the Council does not serve its response to the notice served under paragraph 4.4.(a) within the [ ] months then the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule which shall from the time of completion of the disposal cease to apply
- (c) if the Council or any other person cannot within [ ] months of the date of service of its response under paragraph 4.4(a) secure such transfer then provided that the Chargee shall have complied with its obligations under paragraph 4.4(a) the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule which shall from the time of completion of the disposal cease to apply

PROVIDED THAT at all times the rights and obligations in this paragraph 4.4 shall not require the Chargee to act contrary to its duties under the charge or mortgage and that the Council must give full consideration to protecting the interest of the Chargee in respect of moneys outstanding under the charge or mortgage

---

<sup>38</sup> See the Affordable Housing Drafting Notes

<sup>39</sup> See land transfer provisions if this clause is adopted.

<sup>40</sup> It is recognised that there can be room for negotiation on this standard. As with any property acquisition it will be necessary to consider whether any other easements and provisions will be necessary, for example obligations to maintain roads pending adoption

## Affordable Housing

### VERSION TWO

#### Definitions – (to be included in clause 1)

- “Additional Dwelling Sum”** means the sum of £[ ] ( words )
- “Affordable Housing”** means housing which is available to persons who have a housing need or are on a low income insufficient to meet their housing need in the open market either to rent or purchase
- “Affordable Housing Area”** means one or more areas within a Housing Parcel to be developed for Affordable Housing
- “Affordable Housing Base Price”** means with regard to an Affordable Housing Land Sale Contract a sum equal to £[ ] ( words ) multiplied by the aggregate GIA in square metres of the Affordable Housing Units to which such contract relates, such sum being:
- (a) appropriately increased to reflect any subsequent changes in the Regulations or specification or standards or legislative, policy or regulatory requirements relating to or affecting the construction of the Affordable Housing Units; and
  - (b) (in respect of Affordable Housing for disabled use or other special needs or supported living needs only) appropriately increased to reflect any special adaptations involving equipment or specification in excess of those applicable to Lifetime Homes Standards (as defined by the Joseph Rowntree Foundation)
- “Affordable Housing General Scheme”** means
- (a) the scheme set out in Schedule Q relating to the numbers, types and tenures of Affordable Housing within each of the thirteen Housing Parcels, and
  - (b) any amendment to such scheme agreed in writing by the Council
- “Affordable Housing Land”** means land upon which any Affordable Housing Units are to be built pursuant to an approved Affordable Housing Specific Scheme
- “Affordable Housing Land Sale Contract”** means a contract for the sale and purchase of Affordable Housing Land which shall (unless the Affordable Housing Units on the relevant Affordable Housing Land are already Practically Completed) contain provision for the Owner and

an Affordable Housing Provider to enter into a JCT or other construction contract prior to or upon completion of the transfer of the Affordable Housing Land at a price for the Affordable Housing Land and a contract which together shall be the Affordable Housing Base Price

**“Affordable Housing Overall Provision”**

means the provision of thirty percent (30%) of the total number of Housing Units on the Development Site as Affordable Housing Units

**“Affordable Housing Provider”**

means a body whose function or aim is to provide and manage Affordable Housing (including Affordable Housing of the type and amount proposed within the Development) including a housing association or associations or housing company or companies or a trust or trusts registered as a registered social landlord (pursuant to the Housing Act 1996) with the Housing Corporation<sup>41</sup> or an alternative affordable housing provider nominated by the Council in response to the Pre-Tender Notice and within 21 (twenty-one) days of its service

**“Affordable Housing Specific Scheme”**

means a written scheme which

- (i) relates to a Housing Parcel;
- (ii) conforms with the Affordable Housing General Scheme;
- (iii) provides for the construction of the Affordable Housing Units:
  - (a) in relation to houses in single groups of not more than [ figure ] ( words ) (unless otherwise agreed by the Council in its absolute discretion); and
  - (b) in relation to flats within single blocks of not more than [figure] ( words ) provided that no more than [ figure ] ( words ) such blocks shall be sited within a Housing Parcel (in each case unless otherwise agreed by the Council in its absolute discretion); and
  - (c) (in regard to achieving the requirements of paragraphs (a) and (b) of this paragraph (iii) of this definition) such that groups of Affordable Housing Units shall whenever possible (unless otherwise agreed by the Council) not be located adjacent to other existing or proposed groups of Affordable Housing Units

---

<sup>41</sup> See the Affordable Housing Drafting Notes

(iv) sets out the way in which the proposed design of the Affordable Housing Units utilises techniques an objective of which inter alia is that the Affordable Housing Units should be materially indistinguishable (in terms of outward design and appearance) from the General Housing Units of similar size

(v) sets out the way in which the Owner has complied and is proposing to comply with the requirements of paragraph 1.1.8

(vi) identifies the location of the Affordable Housing Land within the relevant Housing Parcel

**“Affordable Housing Unit”**

means a Housing Unit to be provided for Affordable Housing in accordance with the Consent

**“Discounted Market Sale”**

means in respect of an Affordable Housing Unit sale on the open market at a discount of not less than [ figure % ] ( words percent) from the Market Value of a dwelling of similar size and design in the Council’s area

**“Discounted Market Sale Restriction”**

means the restriction to be entered in the Proprietorship Register at the Land Registry in relation to each Discounted Market Sale Unit in the following terms (subject to any amendments thereto required by the Land Registry and agreed between the parties hereto):

"No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without a certificate signed by the solicitor of the disponor or the donee that the provisions of paragraph 1.4.1.6 of this Schedule dated [ ] containing planning obligations relating to land at [ ] between (1) [ ] Council (2) [ ] County Council (3) [ ] have been complied with"

**“Discounted Market Sale Unit”**

means any of the Affordable Housing Units to be sold by way of Discounted Market Sale

**“Disposal Date”**

in paragraph 4.1.7 shall mean the completion of the relevant transaction<sup>42</sup> and for the avoidance of doubt (a) in paragraph (iii) is the completion of the acquisition of the 100% interest and not the grant of the original demise and (b) in paragraph (iv) is not the grant of the original demise

---

<sup>42</sup> A planning obligation can be limited in time – see s.106(2) – (unless it relates to the payment of money). See paragraph 4.1.7. This approach makes it clear that the restrictions on Affordable Housing Land cease to apply to eg a staircased property which staircasing takes place. The ways to terminate liability under a planning obligation are set out in s.106(2) and (4).

but is the expiry of the time period for nomination or exchange of contracts referred to in that paragraph with no nomination or exchange of contracts

**“Fixed Equity Sale”**

means in respect of an Affordable Housing Unit sale on the open market where [ ] % ([ ] per cent) of the equity of the relevant unit is owned by the occupier of that unit but where no rent is payable upon the remaining equity retained by the Affordable Housing Provider and where such owner is not entitled to acquire the remaining equity from the Affordable Housing Provider

**“Fixed Equity Sale Restriction”**

means the restriction to be entered in the Proprietorship Register at the Land Registry in relation to each Fixed Equity Sale Unit in the following terms (subject to any amendments thereto required by the Land Registry and agreed between the parties hereto):

"No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without a certificate signed by the solicitor of the disponor or the donee that the provisions of paragraph 1.4.1.6 of this Schedule dated [ ] containing planning obligations relating to land at [ ] between (1) [ ] Council (2) [ ] County Council (3) [ ] have been complied with"

**“Fixed Equity Sale Unit”**

means any of the Affordable Housing Units to be sold by way of Fixed Equity Sale

**“Fully Serviced”**

means that the relevant property has proper connections within its boundary so as to connect it to surface water drainage facilities and to mains foul drainage water gas electricity and telecommunications (or such of the aforesaid services, if any, the provision of which is anticipated to be required as hereinafter mentioned) and enjoys direct access to the public highway or a roadway constructed to adoptable standards (connecting to the public highway) which is the subject of an agreement under section 38 of the Highways Act 1980 to be adopted as a highway maintainable at the public expense and in each case adequate for the purpose of its prospective use and the parties anticipate as at the date that the connections/access required will be as indicated in Schedule [ ]

**“General Housing Unit”**

means a Housing Unit which is not an Affordable Housing Unit and “General Housing” shall be construed accordingly

<b>“Housing Corporation”</b>	means the Housing Corporation <sup>43</sup> which shall include any successor to the Housing Corporation in respect of the functions relevant to the Affordable Housing provisions of this Agreement
<b>“HCA Grant Funding”</b>	means funding made available by the Homes and Communities Agency in respect of the Affordable Housing Units
<b>“Housing Parcel”</b>	means a parcel of housing development as shown on the Phasing Plan
<b>“Housing Plot”</b>	means a plot upon which an Affordable Housing Unit is to be built
<b>“Housing Unit”</b>	means a housing unit to be constructed pursuant to the Consent
<b>“Marketed”</b>	<p>means with regard to Affordable Housing Land that</p> <p>(a) for a period of 6 (six) months from the Implementation of each Housing Parcel or until such time as contract negotiations with an Affordable Housing Provider have been completed or terminated (whichever is the sooner) reasonable endeavours have been used by the Owner to exchange an Affordable Housing Land Sale Contract of the Affordable Housing Land within that Housing Parcel with an Affordable Housing Provider in accordance with the Primary Terms; or</p> <p>(b) (if the exchange of contracts referred to in paragraph (a) of this definition does not occur within the First Marketing Period) the Owner and the Council have followed the Tender Procedure with regard to the said Affordable Housing Land</p> <p>and "Marketing" shall be construed accordingly</p>
<b>“Market Value”</b>	means the estimated price or premium for which the sale of the freehold estate or the grant of a long leasehold interest in land (not being a rack rented lease) for the use thereof specified in this Agreement should complete on the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion
<b>“Notified Owner”</b>	Means any person(s) comprised in the Owner provided that in the case of a person deriving title from the person(s) originally comprising the Owners named in this Agreement

---

<sup>43</sup> See the Affordable Housing Drafting Notes

such person shall have been notified to the County Council and Council pursuant to paragraph 4.1.9

**“Practically Completed”**

means

(a) completed so that the relevant works can be used for the purpose and operate in the manner for which they were designed and

(b) fitted out so that they are available for occupation

**“Provided”**

means

(a) Practically Completed; or

(b) the subject of an executed legally binding Affordable Housing Land Sale Contract with an Affordable Housing Provider which includes a requirement to Practically Complete the Affordable Housing Units within a Housing Parcel and to fit them out so that they are available for Occupation within 18 months of the date of the said contract; or

(c) the subject of an executed transfer of the relevant Affordable Housing Land to the Council in the circumstances referred to and on the terms set out in Clause 4.1.5(a)

and **“Provide”** shall be construed accordingly

**“Regulations”**

means the Housing Corporation Scheme Development Standards (Fifth Edition April 2003) Building Regulations as amended or replaced from time to time

**“Reserved Matters Application”**

means a reserved matters application pursuant to the Consent

**“Successful Tenderer”**

means the Selected Tenderer or combination of Selected Tenderers whose tender(s) (whether alone or in aggregate):

(a) most closely meets the Optimum Size and Tenure Mix as it applies to the relevant Housing Parcel;

(b) offers to deliver not less than 33.33% (thirty three point three three percent) of the Affordable Housing Units within the relevant Housing Parcel for Social Rented Housing and not more than 66.67% (sixty-six point six seven percent) of the Affordable Housing Units within the relevant Housing Parcel for Intermediate Rented Housing and Shared Ownership Housing;

(c) (subject to paragraph (d) of this definition) if any offers no more than 10% (ten per cent) of the Affordable

Housing Units within the relevant Housing Parcel for Discounted Market Sale and/or Fixed Equity Sale; and

(d) does not include any Discounted Market Sale and/or Fixed Equity Sale unless the Social Rented Housing element of the Affordable Housing Units within the relevant Housing Parcel is at least one Unit more than 33.33% (thirty three point three three percent)

**“Tender Documents”**

means the documents for use in respect of the Tender Procedure whose purpose shall (inter alia) be to ensure the delivery of the Affordable Housing Overall Provision and shall include (without limitation) the Nomination Agreements to be entered into with the Council

**“Tender Period”**

means the period of 12 (twelve) months from the date of service of a Pre Tender Notice

**“Tender Procedure”**

means the procedure set out in Schedule P

**4.1 Affordable Housing**

4.1.1 In carrying out the Development to ensure the Affordable Housing Units shall be:

- (a) Provided; and
- (b) provided in accordance with the approved Affordable Housing General Scheme; and
- (c) provided in accordance with the approved Affordable Housing Specific Schemes; and
- (d) constructed in accordance with the Regulations and all other applicable legislative policy and regulatory requirements;

4.1.2

- (a) Not to Commence Development in respect of any Housing Parcel without having obtained the written approval of the Council to an Affordable Housing Specific Scheme for that Housing Parcel such scheme to be submitted for approval simultaneously with the submission of the first Reserved Matters Application for that Housing Parcel
- (b) Not to Commence Development without having obtained the written approval of the Council to the Owner's timetable for inviting tenders in accordance with the Tender Procedure;

4.1.3

- (a) Not to Commence Development in respect of any Housing Parcel without first having commenced the Marketing of all of the Affordable Housing Areas within that Housing Parcel
- (b) Not to Occupy any General Housing Unit within a Housing Parcel unless the Affordable Housing Areas within that Housing Parcel are being Marketed or unless in relation to the said Affordable Housing Areas:

- (i) contracts are exchanged as envisaged in paragraph (a) of the definition of Marketed and completed or
- (ii) contracts are exchanged pursuant to the Tender Procedure and completed or
- (iii) Clause 4.1.5(b) is complied with to the extent of construction and first Occupation of the relevant Affordable Housing Units; or
- (iv) the Council has served written notice on the relevant Notified Owner(s) pursuant to Clause 4.1.5(a).

#### 4.1.4 Not to Occupy

- (a) more than [ ]% ([ ] percent) of the General Housing Units comprised in each Housing Parcel until such time as [ ]% ([ ] percent) of the Affordable Housing Units to be provided within that Housing Parcel shall have been Provided and
- (b) more than 85% (eighty five percent) of the General Housing Units comprised in each Housing Parcel until such time as 100% (one hundred percent) of the Affordable Housing Units to be provided within that Housing Parcel shall have been Provided;

#### 4.1.5

- (a) (Subject to Clause 1.4.1.5(b)) in the event that either paragraph 6 of Schedule P [at page 56] applies and no Successful Tenderer is identified within the Tender Period in accordance with such provision or paragraph 7 of Schedule P applies and an Affordable Housing Land Sale Contract is not entered into within the period referred to in paragraph 7 of Schedule P the Council shall be entitled to call for the transfer to it of the Affordable Housing Land within the relevant Housing Parcel by service of written notice on the relevant Notified Owner(s), such notice to be served within four (4) weeks following notification to the Council of the expiry of the relevant Tender Period or (as the case may be) the expiry of the period referred to in paragraph 7 of Schedule P (time to be of the essence for these purposes) and upon service of such notice the following provisions shall apply:-
  - (i) the relevant Owner(s) shall be bound to transfer to the Council such Affordable Housing Land and the Council shall be bound to take such transfer on the date falling two (2) weeks after the later of the date of the Council's notice as aforesaid and the date that the requirements of [contaminated land provisions if relevant] have been satisfied;
  - (ii) the consideration for such transfer shall be one pound (£1);
  - (iii) include contract provisions and the transfer shall reserve over the Land or the relevant part(s) of it the rights referred to in [ ];
  - (iv) the Owner shall ensure that the Affordable Housing Land the subject of such transfer is Fully Serviced by no later than the expiry of the period of [ ] ([ ]) months following the date of such transfer (the Council allowing the Owner and/or any person(s) authorised by it or acting on its behalf such access onto such Affordable Housing Land as is reasonably required to enable the Owner to comply with its obligation under this Clause 4.1.5(a)(iv) Provided That if such Affordable Housing Land is not Fully Serviced by the expiry of such period (the Council having allowed the Owner access onto such Affordable Housing Land as aforesaid) the Council may itself carry out the works the Owner covenants to carry out pursuant to this Paragraph 4.1.5(a)(iv) and recover the proper cost of such works from

the Owner and the transfer of such Affordable Housing Land to the Council shall reserve such rights (if any) over the Land (or the relevant part(s) of it) as are necessary to enable the Council to carry out such works in default of the Owner (the reservation of such rights in the transfer of such Affordable Housing Land to the Council being subject to the requirements respectively that any access onto the Land or the relevant part(s) of it shall be at reasonable times and upon at least 24 (twenty four) hours' written notice to the relevant Owner (save in case of emergency when no notice is required) and that the person exercising such rights shall cause as little damage and inconvenience as practicable and as soon as reasonably practicable make good all damage caused to the Land or the relevant part(s) of it to the reasonable satisfaction of the relevant Owner(s))

Provided That if the Council exercises its option pursuant to this Paragraph 4.1.5(a) and takes a transfer of the relevant Affordable Housing Land the Owner shall be released absolutely from its obligations (save for the Owner's obligations under Paragraph 4.1.5(a)(iv) insofar as such obligations remain to be performed) under Paragraph 4.1 in respect of such Affordable Housing Land;

- (b) In the event that contracts are not exchanged pursuant to paragraph 7 of Schedule P within the three (3) months referred to in that paragraph (or such longer period as is agreed to by the Council) and where the Council does not serve notice pursuant to Paragraph 4.1.5(a) to Provide in accordance with Paragraph 4.1.1 the Affordable Housing Units within the relevant Housing Parcel prior to exceeding the Occupation limits set out in Paragraph 4.1.4 in accordance with the Minimum Tenure Mix and thereafter to Occupy the said Affordable Housing Units with no less than 33.33% (thirty three point three three percent) thereof Occupied for Social Rented Housing and not more than 66.67% (sixty six point six seven percent) thereof Occupied for Intermediate Rent and/or Shared Ownership;

4.1.6 No Discounted Market Sale Unit or Fixed Equity Sale Unit shall be Occupied following the first or any subsequent sale thereof unless:-

- (a) (in the case of any Discounted Market Sale Unit) the sale price for the Discounted Market Sale Unit shall be not more than 75% (seventy five per cent) of the Market Value of a dwelling of similar size and design in the borough;
- (b) (in the case of any Fixed Equity Sale Unit) the purchaser of the relevant Fixed Equity Sale unit acquires on terms which preserve the retention of equity referred to in the definition of Fixed Equity Sale; and
- (c) the transferee shall send to the Council (marked for the attention of the Housing Department) within 14 (fourteen) days of completion of the transfer of each Discounted Market Sale Unit and Fixed Equity Sale Unit notice stating the total price paid;
- (d) in the case of any Discounted Market Sale Unit it is (or in the case of the first sale will following completion of the registration at the Land Registry of the transfer of such Discounted Market Sale Unit be) subject to the Discounted Market Sale Restriction on the register of title to the relevant Discounted Market Sale Unit;
- (e) in the case of any Fixed Equity Sale Unit it is (or in the case of the first sale will following completion of the registration at the Land Registry of the transfer of such Fixed Equity Sale Unit be) subject to the Fixed Equity Sale Restriction on the register of title to the relevant Fixed Equity Sale Unit; and
- (f) in the case of a Discounted Market Sale Unit and a Fixed Equity Sale Unit a copy of the relevant restriction and the certificate referred to therein has been

supplied to the Council (marked for the attention of the Housing Department) on each such disposition of such unit.

- 4.1.7 The Affordable Housing Land and the Affordable Housing Units shall not be used for any purpose other than for the provision of the Affordable Housing Units in accordance with this Agreement

Provided That:-

- (a) the covenants affecting the Affordable Housing Land under the foregoing provisions of this Paragraph 4.1 shall:-
- (i) not from the Disposal Date apply to any part of the Affordable Housing Land and/or the Affordable Housing Units which an Affordable Housing Provider shall be required to dispose of pursuant to a right to acquire under Part V of the Housing Act 1985 or Section 16 of the Housing Act 1996 or any similar or substitute right applicable or shall be required to sell to a tenant with the benefit of a voluntary purchaser grant provided under Sections 20 and 21 of the Housing Act 1996 (or any similar provision in any subsequent legislation)
  - (ii) not from the Disposal Date bind any service supplier that purchases or leases or takes a transfer of any part of the Affordable Housing Land
  - (iii) not from the Disposal Date apply to any Affordable Housing Unit demised by way of a Shared Ownership lease where (in the case of a Dwelling) the lessee or any assignee of such lease has staircased his interest in that unit such that he acquires one hundred per cent (100%) of the equity in that unit and either takes a transfer of the freehold reversion or directs that the freehold reversion is transferred to a third party or (in the case of a flat) acquires a one hundred per cent (100%) equity share in the lease of the flat and takes a new non-Affordable Housing lease of the flat or retains the existing lease
  - (iv) not from the Disposal Date until the date of resale referred to below apply to any Affordable Housing Unit demised by way of a Shared Ownership lease where the lessee wanting to transfer his Shared Ownership interest has complied with the nomination provisions (if any) of such lease and has first offered to sell his Shared Ownership interest to a nominee of the Affordable Housing Provider but the Affordable Housing Provider has been unable or unwilling to provide a nominee within the time period specified in such lease or such nominee has not exchanged contracts to acquire or not acquired the lessee's interest within the time period specified within such lease Provided That when the same Housing Unit(s) next becomes available for re-sale the covenants in this Paragraph 4.1 shall again apply and the Council shall be entitled to exercise its nomination rights in respect of the same pursuant to the Relevant Nomination Agreement;
- (b) it is agreed that:-
- (i) a mortgagee or chargee of the Affordable Housing Land seeking to dispose of the Affordable Housing Land pursuant to its power of sale or other remedies under the terms of its mortgage or charge shall first seek to dispose of the said land to an Affordable Housing Provider or at the Council's written election the Homes and Communities Agency (the Council being entitled to nominate an Affordable Housing Provider or the Homes and Communities Agency for these purposes by service of notice in writing to such mortgagee or chargee within

56 (fifty six) days of such mortgagee or chargee notifying the Council in writing of its intention to exercise its power of sale) Provided That for the avoidance of doubt such mortgagee or chargee shall not be under any obligation to dispose of the relevant Affordable Housing Land or Affordable Housing Unit for any sum less than the monies outstanding pursuant to the said mortgage or charge;

- (ii) in the event of any sale not taking place in accordance with the foregoing paragraph within a period of three (3) months following the service of the Council's notice thereunder or in the absence of such notice any mortgagee or chargee (or its or their receiver or manager of the whole or any part of the relevant Affordable Housing Land) shall be entitled to sell such land or the relevant part thereof pursuant to its or their power of sale or other remedies under the mortgage or charge in question on the open market and from the date of actual completion the foregoing provisions<sup>44</sup> of this Paragraph 4.1 shall not apply to the Affordable Housing Land as sold nor shall any successor in title to or person deriving title from such mortgagee or chargee be so bound.

4.1.8 The Owner shall use all reasonable endeavours to achieve the tenure mix set out in Schedule Q in respect of the Affordable Housing Land such reasonable endeavours to include:

- (1) early engagement with the Homes and Communities Agency and an Affordable Housing Provider;
- (2) robust search of the Affordable Housing market;
- (3) sound value for money bids to the Homes and Communities Agency for Housing Corporation<sup>45</sup> Grant Funding
- (4) ongoing engagement with the Council;
- (5) working with an Affordable Housing Provider to identify and secure alternative possible sources of public subsidy.

4.1.9 The Owner shall notify the Council and County Council within 14 (fourteen) days of the completion of any disposal of land comprised in the land together with details of the name, address, registered office and company number of the disponent (in the case of a company or limited liability partnership or any other non-natural legal person) other than disposals to occupiers, utility companies or other statutory undertakers acting in their capacity as such or the Council or the County Council or persons deriving title therefrom.

---

<sup>44</sup> See also the footnote to the definition of Disposal Date.

<sup>45</sup> See the Affordable Housing Drafting Notes

## SCHEDULE P

### Tender Procedure

1. Within 7 (seven) days of the expiry of the First Marketing Period the Owner shall serve the Pre-Tender Notice on the Council and have obtained the Council's written approval of the Tender Documents (such approval to be deemed to have been given in respect of any Nomination Agreement in or substantially in the form set out in Schedule A Part 4A or 4B (as the case may be)).
2. Upon receipt of a written response from the Council to the Pre-Tender Notice or upon the expiry of 21 (twenty one) days from service of the Pre-Tender Notice (if earlier) to invite from the Affordable Housing Providers listed in the Pre-Tender Notice and from any additional Affordable Housing Providers nominated by the Council in response to the Pre-Tender Notice tenders for the disposal of the relevant Affordable Housing Land by way of Affordable Housing Land Sale Contract on the Primary Terms giving a period of not less than 2 (two) months for tender submissions to be made.
3. Upon conclusion of the period given for submission of tenders to serve the Post-Tender Notice upon the Council
4. In the event that the Council responds to the Post-Tender Notice within 14 (fourteen) days of receipt thereof confirming whom it considers to be the Successful Tenderer then the Owner shall be obliged to accept the offer of that tenderer subject to contract.
5. In the event that the Council fails to provide a written response to the Post-Tender Notice within the said 14 (fourteen) days the Owner shall decide whom it considers to be the Successful Tenderer and shall be obliged to accept the offer of that tenderer subject to contract.
6. In the event that no Successful Tenderer is identified as a result of the foregoing paragraphs 4 and 5, the Owner shall repeat the procedure set out in paragraphs 1-5 (but with the substitution of the Secondary Terms for the Primary Terms) as many times as appears reasonably necessary during the Tender Period in order to identify within the Tender Period a Successful Tenderer or to achieve a tenure mix which does not offer less than 33.33% (thirty three point three three percent) Social Rented Housing nor more than 66.67% (sixty six point six seven percent) Intermediate Rental and Shared Ownership and there shall be no Discounted Market Sale Units nor any Fixed Equity Sale Units and shall thereafter be obliged to accept the relevant tender subject to contract.
7. For a period of 3 (three) months (or longer if agreed in writing by the Council) from the identification of a Successful Tenderer pursuant to paragraphs 4-6 above the Owner shall use all reasonable endeavours to enter an Affordable Housing Land Sale Contract with the relevant Successful Tenderer such contract to be agreed between the Owner and the Successful Tenderer.

## SCHEDULE Q

### Optimum Size and Tenure Mix

#### Affordable Housing General Scheme

(NB, numbers are an example only)

Housing Parcel Tenure		1	2	3	4	5	6	7	8	9	10	
<b>Social Rent</b>	1bf	2	2	1	1	1	1	3	1	1	3	
	2bf	3	2	2	2	2	2	6	2	2	3	
	2bh	7	4	4	3	2	3	9	2	4	6	
	3bh	11	10	11	4	4	5	15	4	5	13	
	4bh	2	2	2	2	2	2	3	2	2	2	
	5bh	1		1	1	1	1	1	1	1	1	
	2bb							2				
	3bb							2				
<b>Int Rent</b>	1bf						1	1				
	2bf							1				
	2bh	1	1	1	1	1	1	1	1	1	1	
	3bh						1	1				
	4bh	2		1				1				
	5bh		1		1			1			1	
<b>SO</b>	2bf	1	1	1	1	1	1	1		1	2	
	2bh	2	2	2	1	1	2	3	2	2	2	
	3bh	2	2	2	1	1	1	3	1	1	2	
	4bh		1	1				1			1	
	2bb	1										
	3bb	1										
<b>DMS</b>	1bf	1	1					1	1	1	1	

	<b>2bf</b>		1					1	1	1	1	
	<b>2bh</b>	1	1	1	1	1	1	1	1		1	
	<b>3bh</b>	1	1	1	1	1		1	1		1	
	<b>2bb</b>	1										
	<b>3bb</b>	1										
		41	32	31	20	18	22	59	20	22	41	
		41	32	31	20	18	22	59	20	22	41	

**Key: SO – Shared Ownership**

**DMS – Discounted Market Sales and Fixed Equity Sales**

**bf – bedroomed flat      bh – bedroomed house      bb – bedroomed bungalow**

## Affordable Housing

### VERSION THREE

#### OR

Definition (to be included in Clause 1)

“Actual Housing Costs”	means aggregate annual expenditure upon rent, mortgage payments and service charges in respect of the Affordable Housing Unit in question;
“Affordable Housing Land”	means the land shown edged [green] on the Plan;
“Affordable Housing Units”	means the Intermediate Affordable Housing Units and the Social Rented Affordable Housing Units constructed and made ready for Occupation in accordance with the Standards;
“Development”	means the development authorised by the Permission;
“Disposal Date”	in paragraph 4.4 shall mean the date of completion of the relevant disposal by the Mortgagee or Registered Social Landlord or the disposal of the one hundred per cent of the equity <sup>46</sup>
“Dwelling”	means any dwelling (whether a house, flat or maisonette) forming part of the Development;
“Intermediate Affordable Housing Unit”	means one of the [words] [figures] Affordable Housing Units comprising [ ] x [1 bedroom units, [ ] x 2 bedroom units and [ ] x 3 bedroom units shown coloured [blue] on Plan [ ] forming part of the Development;
“Intermediate Housing Costs <sup>47</sup> ”	means aggregate rent, purchase price and service charges that would result in annual expenditure upon rent, mortgage payments and service charges as the case may be in respect of the Affordable Housing Unit in question that is substantially below market levels and is affordable by households on incomes of less than £[ ] and where the purchase price is no greater than [ ] times the said household income and where the annual housing costs, including rent and service charge is greater than [ ]% of net household income]; Provided That all such sums referred to above shall be adjusted in accordance with such annual reviews of the corresponding figures as are published by the [Council or regional body] or any successor public authority to reflect changes in income/house price ratios Provided That in default of such figures being so published on an annual basis such sums may be amended from time to time by agreement in writing between the Council and the Owner having regard to changes in income/house price ratios relating to the Council area;

---

<sup>46</sup> See the footnote to definition of Disposal Date in Version Two.

<sup>47</sup> On this definition as a whole, see also the footnotes on the definitions of Social Rented Costs.

“Intermediate Terms”	means terms that provide for Occupation pursuant to a periodic [weekly/monthly] tenancy or on Shared Ownership Terms;
“Market Housing Units”	means any Dwellings that are not Affordable Housing Units;
“Registered Social Landlord”	means one or more registered social landlord(s) within the meaning of the Housing Act 1996 (and any amendment, re-enactment or successor provision) including its successors and assigns from time to time to be drawn from the Council’s Approved List of Registered Social Landlords (as may be amended from time to time) or another registered social landlord proposed by the Developer and approved by the Council;
“Shared Ownership Terms”	means terms pursuant to a lease of an Affordable Housing Unit disposed of a type described in (a) of the definition of “disposal on shared ownership terms” in Section 2(6) of the Housing Act 1996 and marketed in accordance with the requirements of the [Housing Corporation’s Financial Guidance 2007] or any replacement guidance issued by the [Housing Corporation] or any successor body;
“Social Rented Affordable Housing Unit”	means one of the [words] ([figures]) Affordable Housing Units comprising [ ] x 1 bedroom units, [ ] 2 bedroom units, [ ] x 3 bedroom units and [ ] x 4 bedroom units shown coloured [pink] on Plan [ ], forming part of the Development;
“Social Rented Costs”	<p>means aggregate rent and service charges would result in annual expenditure in respect of the Affordable Housing Unit in question as:</p> <p>(i) in respect of the rent element is no more than target rents set by the Government for local authority and housing association and housing co-operative tenants; and</p> <p>(ii) results in service charges not being so great as to make a tenancy unaffordable<sup>48</sup> for a household [with an income of less than £[ ]] on the basis of rents and service charges not exceeding [ ]% of net household income;</p> <p>Provided That all such sums referred to above shall be adjusted in accordance with such annual reviews of the corresponding figures as are published by the [Council or regional body] or any successor public authority to reflect changes in income/house price ratios Provided That in default of such figures being so published on an annual basis such sums may be amended from time to time by agreement in writing between the Council and the Owner<sup>49</sup> having</p>

---

<sup>48</sup> *There are obvious difficulties in applying this test.*

<sup>49</sup> *The precedent from which this was taken had RSL in place of Owner. However, the RSL was not (and often is not) a party so that contractual obligations to behave reasonably would not apply to it. “Owner” has been substituted, but has problems as the persons within the definition proliferate as the Site is built out and sold in plots. It will be necessary to address this in land transfers, so that actual participation in the negotiation is by the RSL owning the relevant Social Rented Affordable Housing Unit. This provision also supposes that in normal circumstances there will be a readily identifiable annual review of rent and service charges, in perpetuity, which the parties are willing to accept, although it can obviously not be identified.*

regard to changes in income/house price ratios relating to the Council's area;

"Social Rented Terms" means terms that provide for Occupation only pursuant to a periodic [weekly/monthly] tenancy;

"Standards" means the Housing Corporation Design and Quality Standard (or any successor standards) that apply at the time of commencement of construction of the Affordable Housing Units in question together with Joseph Rowntree Lifetime Standards together with at least Code for Sustainable Homes Level 3

4.1 Subject to paragraph 4.3 no more than [...insert %...] of the Market Housing Units shall be Occupied until the Affordable Housing Land has been transferred to the Registered Social Landlord for nil value with the benefit of the following:<sup>50</sup>

4.1.1 full and free rights of access both pedestrian and vehicular from the public highway to the Affordable Housing Land;

4.1.2 full and free rights to the passage of water soil electricity gas and other services through the pipes drains channels wires cables and conduits which shall be in the adjoining land up to and abutting the boundary to the Affordable Housing Land all such services to be connected to the mains.

4.2 The Owner

4.2.1 shall not Commence Development until it has submitted to the Council the name of the chosen Registered Social Landlord (for its approval only in the case of a Registered Social Landlord not on the Council's approved list)<sup>51</sup>;

4.2.2 construct the Affordable Housing Units<sup>52</sup> and make the same ready for Occupation in accordance with Standards<sup>53</sup> to the reasonable satisfaction of the Council as part of the Development upon the Site<sup>54</sup> at no cost to the Council prior to use or Occupation of more than [words] per cent ([figure]) of the Market Housing Units<sup>55</sup>;

4.2.3 that no more than [words] per cent ([figures]%) of the Market Housing Units shall be used or Occupied unless and until the Owner has constructed the Affordable Housing Units and made the same ready for Occupation as aforesaid and has disposed of a freehold or [a one hundred and

---

<sup>50</sup> See land transfer provisions if this clause is adopted.

<sup>51</sup> *Delivering Affordable Housing (DAH), DCLG November 2006, Annex C, paras 48-50.*

<sup>52</sup> *PPS3, DCLG, November 2006, paras 27-29.*

<sup>53</sup> *The obligation requires the AH to be built to the requisite Standard notwithstanding any contractual or other obligation as between the Developer and the RSL so as to provide certainty should the Council need to use its powers under s106(5) or (6). See also Planning Obligations: Practice Guide, DCLG, July 2006, para 2.8.*

<sup>54</sup> *PPS3, para 29, last bullet point.*

<sup>55</sup> *Circular 5/2005, paras B12-B14; Planning Obligations: Practice Guide, DCLG, July 2006, paras 1.2-2.8.*

twenty five (125)/ nine hundred and ninety nine (999)] year leasehold interest]<sup>56</sup> in the Affordable Housing Units to a Registered Social Landlord on the terms set out in the [ ] Schedule<sup>57</sup>.

4.2.4 that if any Social Rented Affordable Housing Unit is used or Occupied the Owner<sup>58</sup> shall, and shall only, use or Occupy that Affordable Housing Unit (and shall procure that that Social Rented Affordable Housing Unit shall, and shall only, be used or Occupied) pursuant to arrangements that secure that the Actual Housing Costs do not exceed the Social Rented Costs.

4.2.5 that if any Intermediate Affordable Housing Unit is used or Occupied the Owner<sup>59</sup> shall, and shall only, use or Occupy that Intermediate Affordable Housing Unit (and shall procure that the Intermediate Affordable Housing Unit shall, and shall only) be used or Occupied pursuant to arrangements that secure that the Actual Housing Costs do not exceed Intermediate Housing Costs.

4.2.6 shall not use the Affordable Housing Units otherwise than in accordance with the requirements of the [Housing Corporation's Financial Funding Guidance] current for the time being or any replacement guidance issued by the Housing Corporation<sup>60</sup> or any successor body<sup>61</sup>.

4.2.7 that the Social Rented Affordable Housing Units may only be used or Occupied on Social Rented Terms<sup>62</sup>.

4.2.8 that the Intermediate Affordable Housing Units may only be used or Occupied on [Intermediate Terms/Shared Ownership Terms];

4.3<sup>63</sup>. The restrictions contained in this [Affordable Housing part] of this Schedule shall

4.3.1 on the date of actual completion of any sale by a mortgagee of any Registered Social Landlord of the Affordable Housing Units or any receiver appointed by such mortgagee or charge pursuant to any [ ] [ ] or default by the mortgagor provided (in the case of a disposal by a mortgagee or receiver) the following conditions have been satisfied:

4.3.1.1 any power of sale available to any such mortgagee, charge or receiver arising under their mortgage or charge over any such Affordable Housing Unit shall only be exercised in the event of there being a default of any obligation to such mortgagee or charge;

4.3.1.2 confirmation of such default is provided to the Council as soon as reasonably practicable after any notice is served on the Developer;

---

<sup>56</sup> *Delivering Affordable Housing, paras 31-32. The transfer can be made pursuant to e.g. s.120 Local Government Act 1972. See R –v- South Northamptonshire DC ex parte Crest Homes plc (1994) 3 PLR 47, 63B.*

<sup>57</sup> *Consider the extent to which such terms need to be set out, particularly bearing in mind the restriction on occupation of Market Housing Units.*

<sup>58</sup> *As drafted, the owners of land anywhere on the Site will be liable for breach of this.*

<sup>59</sup> *As drafted, the owners of land anywhere on the Site will be liable for breach of this.*

<sup>60</sup> *See the Affordable Housing Drafting Notes*

*A requirement to use the affordable housing in accordance with the Housing Corporation's Financial Funding Guidance is intended to ensure that the housing is managed on terms equivalent to those applicable to an RSL. However, this provision bites on actual occupiers, but they have no means to ensure that their RSL complies with the Guidance.*

<sup>62</sup> *There "needs to be a mix of tenures on new developments" : Delivery Affordable Housing, para 12.*

<sup>63</sup> *The provisions of this paragraph should be checked for compatibility with the requirements of the Council of Mortgage Lenders*

5.3.1.3 the mortgagee or receiver shall not exercise its power of sale for a period of [18 weeks] following the provision of such evidence to allow the Council or a Registered Social Landlord an opportunity to attempt to complete a transfer of the Affordable Housing Units within the said period of [18 weeks] PROVIDED THAT the consideration for any such transfer will discharge the debt owed to the mortgagee or receiver (as appropriate); and

4.3.1.4 if the mortgagee or receiver is unable to dispose of any of the Affordable Housing Units within the said period of [18 weeks] then the mortgagee, charge or receiver shall be entitled to dispose of the Affordable Housing Units for the full market value on the open market or as it sees fit.

cease to apply to the land so sold.

4.3.2 on the date of actual acquisition by any person or party acquiring any of the Affordable Housing Units pursuant to any statutory right to buy or acquire or under the purchase grant scheme pursuant to the Housing Act 1998 cease to apply to the land so acquired.

4.4 From the Disposal Date the restrictions contained in this [Affordable Housing Part] of this Schedule shall not be binding upon any lessee or mortgagee of any lessee of an Affordable Housing Unit disposed of on Shared Ownership Terms and shall cease to apply to such unit where a Registered Social Landlord disposes of one hundred per cent (100%) of the equity in such unit.

**Public Art**

**Definitions** (to be included in clause 1):

“Public Art Contribution” means a financial contribution of [ ] pounds (£[.....]) towards the provision of public art such provision to be entirely at the discretion of the Council in terms of size nature artistic influence and geographical location within the [Council area, or specified area]

Alternative definition:

“Public Art Contribution” means a financial contribution of [ ] pounds (£[.....]) towards the provision of Public Art which will include where appropriate sculpture, street furniture, landscaping and/or architectural detailing within [specify area] [within or within the vicinity of the Development as the Owner and Council may agree]

“Public Art” means [..... ]

5 To pay the Public Art Contribution within [...insert number to be specified...] days of the Commencement of Development

OR

5.1 To include as part of the Development a permanent work of Public Art to the value of the Public Art Contribution which is integral to the Development and permanently affixed to the Development Land the precise nature of the work of art and its precise location on the Development Land to be approved by the Council prior to Occupation of any part of the Development

5.2 The said work shall be provided on or before [...specify date or event...]

## Highways Works<sup>64</sup>

6 Not to Commence the Development prior to entering into the Highways Agreement with the County

---

<sup>64</sup> *New highways for both vehicular and/or pedestrian use, or improvements to existing public highways are frequently required as part of a development involving building operations, and whilst separate statutory powers to enter into agreements to secure either new highways which are subsequently adopted as maintainable by the public or to permit alterations to existing public highways exist in highways legislation, it is normal to include the principles of these highway obligations in a Section 106 Agreement. with the form of the necessary agreement under the highways legislation set out in a Schedule to the Section 106 Agreement. It may be desirable to include this covenant in the Fourth Schedule as a covenant with the County.*

## Transport Contribution

**Definitions** (to be included in clause 1):

- “Transport Contribution” means the contribution of [ ] pounds (£[.....]) to be paid to the Council to provide the Transport Facilities
- “Transport Facilities” means [...describe any facilities required...]
- “Travel Plan Co-ordinator” means the person appointed by the Developer and/or Owner as provided in the Management Strategy who shall be responsible for securing the implementation of the Travel Plan and the day-to-day management of the steps identified in the Travel Plan to be taken to secure the Outcomes.<sup>1</sup>

7.1 To pay to the Council the Transport Contribution towards the provision of the Transport Facilities within [ ] days of the Commencement of Development

7.2 To undertake and complete the Transport Facilities prior to Occupation of [...insert number...] Residential Unit(s)<sup>65</sup>

### 7.3. Appointment of the Travel Plan Co-ordinator

The Development shall not be Commenced [Occupied] unless and until the Travel Plan Co-ordinator has been appointed and the details notified to the Council

### 7.4. Bus Service Contributions

7.4.1 The Owner shall within two months of implementation of Phase 2, Phase 3 and Phase 4 procure the carrying out of a proper survey of the Site’s public transport accessibility levels (“PTALs”)<sup>66</sup> and shall serve [ ] copies of the same upon the Head of Planning within four months on each such implementation<sup>67</sup>;

7.4.2 The following corresponding Bus Service Contributions shall be paid to the Council prior to the implementation of the Phase in question:

Phase	Bus Service Contributions
2	£YYY,YYY
3	£YYY,YYY
4	£YYY,YYY;

7.4.3 The Permission shall not be implemented on the Phase in question unless and until the corresponding Bus Service Contribution referred to in paragraph 7.4.2 has been paid to the Council<sup>68</sup>;

---

<sup>65</sup> *If the facilities are off-site highway improvements a separate agreement with the highway authority under s.278 Highways Act 1980 will be necessary prior to execution of the works. Consider also dedication adoption and long term ownership and maintenance. Consider whether this should be a covenant with the County in the Fourth Schedule.*

<sup>66</sup> *This is highly likely to require better description or definition.*

<sup>67</sup> *This paragraph would need to be redrafted as a restriction on development. It is as drafted not enforceable under s.106. Phases also would need definition.*

<sup>68</sup> *Corresponding covenant to go to County’s covenants: “The Council shall promptly apply the Bus Service Contributions to the provision of improved bus services serving the Site so as to endeavour to improve the PTALs for the Site.”*

## 7.5 **Parking Survey and Controlled Parking Zones**

7.5.1 The Owner shall<sup>69</sup>:

- (a) prior to implementation of Phase 1; and
- (b) within two months of implementation on each of Phase 2, Phase 3 and Phase 4; and
- (c) within 12 months after Occupation of 75% of the New Dwellings permitted to be constructed on Phase 4 pursuant to the Permission

procure the carrying out of proper car parking surveys ("Parking Survey 1, 2, 3, 4 and 5" as the case may be) of the Site and highways in the vicinity of the Site to a specification to be agreed in writing in advance with the Council and shall serve [ ] copies of the same upon the Head of Planning within four months of each such trigger date;

7.5.2 Having regard to each Parking Survey the Head of Planning may by written notice served on the Owner within six months of receipt of Parking Survey 2, 3, 4 or 5 require the Owner to pay a CPZ Consultation Payment within 28 days of the said notice Provided That for the avoidance of doubt not more than four such payments may be required Provided That the CPZ Consultation Payment shall not be payable if on-street parking stress has not increased to at least [90%] on any road within any part of the Parking Survey Area, or has not increased on all roads where Parking Survey 1 showed it was already at or above [90%];

7.5.3 The Owner shall pay the CPZ Consultation Payment within 28 days of the notice referred to in paragraph 7.5.2;

7.5.4 Having regard to CPZ consultation the Head of Planning may by written notice served on the Owner within six months of receipt of each CPZ Consultation Payment require the Owner to pay a CPZ Implementation Payment within 28 days of the said notice Provided That for the avoidance of doubt not more than for such payments may be required;

7.5.5 The Owner shall pay the CPZ Implementation Payment within 28 days of the notice referred to in paragraph 7.5.4;

7.5.6 The Council shall not expend the CPZ Consultation Payments otherwise than upon public consultation exercises and/or the CPZ Implementation Payments otherwise than the implementation of controlled parking zones on or in the vicinity of the Site;

## 7.6 **Car Club**

7.6.1 The Owner shall not Implement until it has submitted a draft scheme for the operation of a car club including:

- (a) the number of Car Parking Spaces in the Development reserved pursuant to paragraph 4 to be made available by the Owner to residents of the Development; and
- (b) the timing of the start of the operation of the car club on the Site

to the Head of Planning for his approval such scheme in its approved form referred to herein as the "Car Club Scheme";

7.6.2 The Development shall not be occupied unless and until the Car Club Scheme has been approved in writing by the Head of Planning;

7.6.3 The Owner shall procure the establishment and promotion of a car club (the "Car Club") on the Site in accordance with the Car Club Scheme and shall provide the names and address of the

---

<sup>69</sup> See footnote to paragraph 7.4.1.

operator of the Car Club to the Head of Planning prior to Occupation and the Development shall not be first Occupied unless and until a Car Club has been established as aforesaid;

7.6.4 The Owner shall secure that [ number ] Car Parking Spaces are reserved for the use of the Car Club on the Site and shall provide and retain those spaces as part and for the lifetime of the development'

7.6.5 The Owner shall pay to the Car Club<sup>70</sup> the sum of £[YY] ([number] pounds) being the membership fee and a contribution towards future usage of the Car Club by the resident referred to in any written notice served on the Owner by the Car Club operator confirming that such resident has joined the Car Club Scheme within 28 days of such notice Provided That the Owner shall not be required to pay more than £[YY] times [D] (the number of the dwellings in the Development) in aggregate;

7.6.6 In the event of the Owner failing to pay the sums specified in paragraph 7.6.5 to the Car Club the Owner shall pay the same to the Council and the Council shall not expend or apply the same otherwise than towards the Car Club;

### 7.7. **Personal Travel Planning**

7.7.1 The Owner shall before Occupation of any [Dwelling/Unit] procure that each intending occupying [household/occupier] is offered a personalised travel plan which is individual to that [household/occupier] and comprises at least a statement of that [household's/occupier's]:

- travel needs
- future sustainable travel options;

7.7.2 The Owner shall procure that if the offer of a personalised travel plan is accepted by a [household/occupier] such a personalised travel plan is produced at the Owner's expense before or within [3] months of first Occupation of the [Dwelling/Unit] in question;

7.7.3 Each [Dwelling/Unit] shall not be first Occupied unless the intending occupying [household/occupier] has been offered a personalised travel plan pursuant to paragraph 7.7.1;

7.7.4 Within [3] months of first occupation of [85%] of the [Dwellings/Units] the Owner shall report in writing to the Council on:

- the number of offers made pursuant to paragraph 7.7.1
- the number of offers accepted
- the number of personalised travel plans produced pursuant to paragraph 7.7.2<sup>71</sup>

### 7.7. **Parking Permit Capping**

7.7.1 The Owner hereby covenants with the Council that it shall not Occupy or Occupy a Dwelling unless and until such person has been given advance notice in writing of the provisions of paragraph 7.7.2 hereof;

---

<sup>70</sup> Under s.106 payments can only be made to the local planning authority – see s.106(1)(d). This would be enforceable under any other powers used for the agreement, but may not run with the land. Clause 8.8 will release the original covenantor. Another way is to provide for the payment to be made to the local planning authority, with a covenant by them to pass it on to the Car Club. Paragraph 7.6.6 addresses this.

<sup>71</sup> This paragraph is of course not enforceable under s.106 and will thus not run with the land. It can be made under other powers, but will not normally run with the land and the original covenantor will be released by clause 8.8 on disposal.

- 7.7.2 The Owner hereby covenants with the Council that it shall ensure that all occupiers of Dwellings are notified in writing that (unless they are the holder of a disabled persons badge issued pursuant to Section 21 of the Chronically Sick and Disabled Persons Act 1970) they are ineligible to be granted a permit to park a vehicle in the residents' parking bay located in the vicinity of the Site;
- 7.7.3 The Owner hereby covenants with the Council that it shall ensure that material published and any agreements entered into by the Owner or their agents for the purpose of selling or letting properties in the Development notify potential purchasers or tenants of the restrictions set out in paragraph 7.4 above<sup>72</sup>.
- 7.7.4 The Owner for itself and its successors in title to the Dwellings hereby waives all rights and entitlement (if any) on the part of the Owner and its successors in title to a residents' parking permit in respect of the Dwellings (unless the resident concerned becomes entitled to a Disabled Person's Badge)<sup>73</sup>.

## 7.8. **Vehicle Trip Monitoring**

- 7.8.1 The Development shall not be used or Occupied until:
- (a) full details of [an automated system to monitor vehicle trips to and from the Site] have been submitted to and approved in writing by the [Local Planning authority] [Secretary of State for Transport]; and
- (b) the system referred to in (a) has been implemented and is operating to the satisfaction of the [Local Planning Authority] [Secretary of State for Transport]

The details to be submitted pursuant to (a) above shall include:

- how the system will be maintained
  - length of the monitoring period which will not be less than [5] years from the date on which [the whole of the Development] shall be first occupied
  - details of the monitoring equipment
  - how the data will be collected
  - how the results will be reported [to the Local Planning Authority] [to the Secretary of State for Transport] [to the occupiers of the development];
- 7.8.2 In the event that the vehicle trips to and from the Site as recorded by the said authorised system exceed [ZZZ] in any calendar year the Owner within 28 days of receipt of notice of the number of vehicle trips exceeding [XXX] pay to the [Local Planning Authority] [Secretary of State for Transport] the [Trip Mitigation Sum] ie a sum calculated by reference to the number of trips in excess of [ZZZ]<sup>74</sup>;
- 7.8.3 The [Trip Mitigation Sum] shall be expended only upon the [Trip Mitigation Measures].

---

<sup>72</sup> *This para is also unenforceable under s.106.*

<sup>73</sup> *This para is also unenforceable under s.106.*

<sup>74</sup> *It is difficult to see how to enforce this if the Owner fails in its duty under paragraph 7.8.1(b) as that duty does not fall within s.106.*

## FOURTH SCHEDULE

### The Owner's Covenants with the County Council

#### Education Contribution<sup>75</sup>

##### Definitions (to be included in clause 1):

"Education Contribution" means the sum of [ ] pounds (£[.....]) to provide additional educational facilities within the [...specify Council area...] required as a consequence of the Development

OR

"Primary School Contribution" means the sum of [ ] pounds (£[.....]) towards the cost of providing additional places at existing primary schools within the [...specify local education within the [...specified area...]

"Secondary School Contribution" means the sum of [ ] pounds (£[.....]) towards the cost of providing additional places at existing secondary schools serving the [...specify area...]

"School Contribution" means the total of the Primary School Contribution and the Secondary School Contribution towards the cost of providing other improvements to existing schools serving the [...specify area...]

#### Covenants

1 To pay the Education Contribution to the Council in its capacity as local education authority [to the County Council in its capacity as local education authority] prior to Occupation of [...specify number of units...] [or within [ ] months of the Commencement of Development]

---

<sup>75</sup> A contribution towards education facilities within the area may be required. The extent of such contribution will depend upon the number of residential units to be provided and the size and extent of the Development. Any financial contribution may also be made in kind by the transfer of land and/or the construction of a school building. If transfer of a site for a school is required use paragraph 1

## FIFTH SCHEDULE

### Council's Covenants

#### Corresponding covenant by Council where land transferred

- 1 The Council agrees to execute the transfer of the property on or before the Property Transfer Trigger on the terms set out in the Seventh Schedule failing which the restriction set out in paragraph 1 of the Third Schedule shall cease to have effect.

#### Repayment of contributions

- 2 The Council hereby covenants with the Owner to use all sums received from the Owner under the terms of this Deed for the purposes specified in this Deed for which they are to be paid or for such other purposes for the benefit of the Development as the Owner and the Council shall agree<sup>76</sup>.
- 3 The Council covenants with the Owner that it will pay to the Owner such amount of any payment made by the Owner to the Council under this Deed which has not been expended in accordance with the provisions of this Deed (and money shall be deemed to be expended if the Council has properly entered into a contract for the expenditure of the money for the purpose for which it is paid which is reasonably likely to result in the fulfilment of that purpose<sup>77</sup>) within [five] years of the date of receipt by the Council of such payment together with interest at the [...insert name of bank...] base rate from time to time for the period from the date of payment to the date of refund.
- 4 The Council shall provide to the Owner such evidence, as the Owner shall reasonably require in order to confirm the expenditure of the sums paid by the Owner under this Deed.

#### Open Space Land<sup>78</sup>

- 5 The Council [the Transferee] shall neither use nor permit to be used the Open Space Land other than as amenity areas for the use of the public without the prior written consent of the Owner.

#### Community Facilities

- 6 The Council shall neither use nor permit to be used the Community Facilities Land other than for the purposes referred to in paragraph [ ] of the [.....] schedule.

#### Discharge of obligations

- 7 At the written request of the Owner the Council shall provide written confirmation of the discharge of the obligations contained in this Deed when satisfied that such obligations have been performed.

---

<sup>76</sup> *Note that this is a contractual obligation to spend the funds*

<sup>77</sup> *There is an obvious avoidance opportunity here by entering into a sham contract and the drafting is intended to reduce the risk. Landowners and developers may wish to satisfy themselves that the contract is proper*

<sup>78</sup> *These restrictive covenants may be moved to the Seventh Schedule (Contract and Land Transfer)*

SIXTH SCHEDULE

**County Council's Covenants<sup>79</sup>**

1 The County Council hereby authorises the Owner's approved contractor to carry out such parts of the Highway Works as are within the public highway at the date of this Deed in accordance with the terms and stipulations contained in this Deed.

---

<sup>79</sup> Consider whether any of the Council's covenants in the Fifth Schedule are applicable to the County Council and include accordingly.

SEVENTH SCHEDULE

**Contract and Land Transfer**

EIGHTH SCHEDULE  
**Highways Agreement<sup>80</sup>**

DATE 2005

PARTIES

1 [LOCAL HIGHWAY AUTHORITY] of [.....*insert address*.....]  
("County Council")

2 [FREEHOLDER] of [.....*insert address*.....]  
("Owner")

3 [DEVELOPER]<sup>81</sup> of [.....*insert address*.....]  
("Developer")

4 [OTHER INTERESTED PERSON] of [.....*insert address*.....]  
("Mortgagee")

INTRODUCTION<sup>82</sup>

1 The County Council is the local highway authority and a local planning authority by whom planning obligations are enforceable for the area in which the Site is situated.

2 The Owner is the freehold owner of the Site.

3 The Developer intends to develop the Site pursuant to the Planning Permission and has entered into [an option with the Owner for the acquisition of the Site]

4 The Mortgagee is the mortgagee under a mortgage dated [ ] of the Owner's interest in the Site

5 The Highways Works are required by the Planning Agreement and the County Council has agreed to adopt them in accordance with this agreement

6 [Recite any other relevant background to assist understanding of the agreement]

7 This Deed is made pursuant to s.106 of the Town and Country Planning Act 1990<sup>83</sup> and s.38 of the Highways Act 1980 (add any other necessary powers) and (to the extent it falls within s.106) creates planning obligations pursuant to that section

8 Any provision of this deed which is not enforceable under s.106 or s.38 is made and shall be enforceable under s.2 Local Government Act 2000 and s.111 Local Government Act 1972

NOW THIS DEED WITNESSES AS FOLLOWS:

**1 DEFINITIONS**

For the purposes of this Deed the following expressions shall have the following meanings:

---

<sup>80</sup> *Highway Authorities may wish to insert their own model agreement under s.38 Highways Act 1980. A sample is set out below.*

<sup>81</sup> *Consider whether necessary to include Developer*

<sup>82</sup> *This section is also known as "Recitals", sets the scene for the obligations which appear later in the Agreement.*

<sup>83</sup> *This Highways Agreement is made under s.106. Draftsmen will wish to consider adding "boilerplate" from the main s.106, and also consider the notes and advice on it.*

“Bond”	means a bond for securing the performance of its obligations (as to the Highway Works) in this Deed such bond to be in the form contained in the First Schedule and with a Bondsman approved by the County Council and in a sum equal to the sum estimated by the Director to be the reasonable cost to the County Council of carrying out the Highway Works
“Completion Certificate”	means the provisional certificate of completion issued by the Director when the Highway Works have been completed to his satisfaction
“Director”	means the Director of Environment and Property Services from time to time of the County Council and in the event that the post is abolished the holder of the post responsible for the County Council’s functions relevant to the particular context in this Deed to which the term relates or an officer duly authorised on his or her behalf
“Drawings”	means those drawings showing an outline indication of the Highway Works dated [ ] and referenced [.....].
“Highway Works”	means: <ul style="list-style-type: none"> <li>(a) the works described in the [.....] Schedule</li> <li>(b) such other ancillary works as the County Council may reasonably require</li> <li>(c) any accommodation works and</li> <li>(d) works which may as a consequence of (a) (b) or (c) be necessary to statutory undertakers' and telecommunications apparatus and all other equipment under in or over the highway</li> <li>(e) any variation to (a) (b) (c) or (d) as agreed between the parties in writing</li> </ul>
“Letter of Technical Approval”	means written confirmation from the County Council that all matters concerning the Highways Work have been agreed
“Liquidated Damages”	means a sum calculated and falling due in accordance with clause 4 being a sum arising from the Owner’s delay and not a penalty
“Maintenance Certificate”	means the final certificate of completion issued by the Director after the Completion Certificate has been issued and the Highway Works have been maintained for the Maintenance Period to the satisfaction of the Director in accordance with clause 3.4
“Maintenance Period”	means the period of twelve months from the issue of the Completion Certificate
“Planning Agreement”	means the planning agreement dated [ ] made between [.....]
“Programme”	means a programme and method statement for carrying out the Highway Works
“Rate of Liquidated Damages”	means the sum of £.....per day/week such sum being a conclusive and agreed estimate between the parties of the damages likely to be

suffered by the County Council if the whole of the Highway Works is not completed by the date prescribed in accordance with clause 3.1

Words and phrases defined in the Planning Agreement shall have the same meaning in this Agreement

2 The Owner covenants and agrees with the County Council:

2.1 to undertake and complete the Highway Works in accordance with clauses 2.2 and 2.4 prior to Occupation of [.....] Dwellings and not to allow more than [.....] Dwellings to be Occupied until the Highway Works are completed] [or within [ ] months of Commencement of Development and to shall notify the County Council in writing within seven days of completion of the same

2.2 (a) to obtain a licence and approval from the County Council prior to commencing works on the highway

(b) at its expense to carry out the Highway Works

(c) before commencing any part of the Highway Works to submit to the County Council for approval:

(i) such additional detailed drawings plans and specifications as the Director may require

(ii) a plan showing existing/additional highways including the route of any drains

(iii) the name and address of the Contractor whom the Owner proposes to employ for carrying out the Highway Works and all insurance details of that Contractor that the County Council may require from time to time

(iv) the Programme

and not to commence any part of the Highway Works until he receives the Letter of Technical Approval

(d) not to permit any building constructed on the Site to be Occupied or used for trading until the matters contained in the Second Schedule have been carried out to permit vehicular traffic to enter and leave the Site safely

(e) not to permit any vehicular traffic to enter or leave the Site other than by way of the new access or egress route provided by the Highway Works once the same is brought into use save only that during construction of the Highway Works an alternative route agreed with the Director may be used and this alternative route shall be closed off and its use discontinued immediately once the use of the new access or egress route provided by the Highway Works is brought into use as aforesaid

(f) to complete the Highway Works in accordance with the Drawings the Programme the Letter of Technical Approval and any other plans drawings and specifications approved under clause 2.2(c) and any instructions as to the materials or method of working given by the Director to his reasonable satisfaction and obtain the Completion Certificate in accordance with clause 3.3 no later than the date set by him under clause 3.1 save only that if the completion by such date becomes impossible by reason of circumstances beyond the control of the Owner the date for completion shall be such later date as may be agreed having regard to the circumstances

(g) to employ the Contractor approved under clause 2.2(c)(iii) for carrying out the Highway Works and give to the County Council adequate contact details for the Contractor so as to enable the Contractor to be contacted at all hours of each day and each night

- (h) to provide wheel-cleaning facilities of a nature approved by the County Council on the Site before commencing any part of the Highway Works and to ensure that during the period from the commencement of the Highway Works until the issue of the Completion Certificate under clause 3.3 or such later date as the County Council shall notify in writing to the Owner before leaving the Site the wheels of all vehicles are sufficiently cleaned to prevent mud from the Site being deposited on the highway PROVIDED THAT any later date notified by the County Council as aforesaid shall not be later than such date as it considers that a stage of development on the Site will have been reached when there will no longer be a risk of mud being deposited on the highway in consequence of construction work being carried out on the Site
- (i) if required by the County Council so to do to provide temporary traffic signal controls such controls to be of a type which meet Department of Transport requirements
- (j) to construct all drains and sewers to the current standards from time to time of the adopting authority
- (k) to comply with all other terms and conditions of this Agreement

2.3 Before any part of the Highway Works are begun the Owner shall:

- (a) serve on the County Council not less than two weeks notice subsequent to the issue of the Letter of Technical Approval of its intention to commence the Highway Works
- (b) enter into and complete the Bond not later than the date for commencement of the Highway Works the Bond to be cancelled when the Highway Works have become maintainable at the public expense in accordance with clause 3.5
- (c) pay to the County Council a sum equal to [    %] of the sum estimated by the Director to be the cost of the Highway Works towards the administrative and technical expenses incurred by the County Council, including the cost of supervising and inspecting the Highway Works as they proceed and the issue of the Completion and Maintenance Certificates
- (d) make all necessary arrangements for carrying out the Highway Works including the service of any necessary notices under the provisions of the New Roads and Street Works Act 1991 and in particular in relation to statutory undertakers' and telecommunications apparatus and all other equipment over or under the highway and for enabling it to comply with the provisions of this Agreement

2.4 The Owner shall throughout the period from the commencement of the Highways Works until the issue of the Completion Certificate under clause 3.3 or such later date as the County Council shall notify in writing to the Owner ensure that:

- (a) adequate warning signs lights and cones are provided and maintained in good working order in accordance with chapter 8 of the Traffic Signs Manual published by her Majesty's Stationery Office
- (b) any mud from the Development or the Highway Works which may be deposited on the highway maintainable at the public expense by vehicles leaving the Development Land or the Highway Works is removed immediately
- (c) any temporary traffic signal controls required by the County Council under clause 2.2(i) are maintained in proper working order

2.5 (a) If at any time during the period specified in clause 2.4 the Owner fails to provide adequate warning signs lights or cones or any such provided are not in good working order or mud is deposited on the highway maintainable at the public expense and not

immediately removed the County Council may take such action as it considers necessary to remedy the failure and shall deduct the full cost of so doing including materials plant transport and labour from the sum deposited by the Owner pursuant to clause 2.11(a)

- (b) On each and every occasion when the County Council takes action as provided in this clause 2.5 or responds to a justifiable complaint he shall be entitled to deduct from the sum deposited under clause 2.11 (a) the sum of fifty pounds or 15% of the cost of the action taken whichever is the greater in respect of his administrative costs in addition to the cost of any action taken in remedying the failure
- (c) If any deductions which shall be made under clause 2.5(a) and 2.5(b) exceed the sum deposited or any balance thereof the Developer [and/or the Owner] shall pay to the County Council the shortfall within 21 days of the County Council serving notice of the amount due

2.6 Until the issue of the Maintenance Certificate pursuant to clause 3.4 the Owner hereby grants to the County Council their servants and agents

- (a) free access to every part of the Highway Works for the purposes of inspecting the same as they proceed and inspecting and testing all materials used or intended to be used therein and the cost of reasonable analysis and test in connection therewith shall be at the expense of the Owner
- (b) the right to enter upon such parts of the Site as it is necessary so to do in furtherance of the terms of this Agreement

2.7 Without prejudice to any other remedy of the County Council in the event of any default by the Owner in preparing for or carrying out the Highway Works or any failure by the Owner to comply with any requirement of the County Council in relation to the Highway Works the County Council may do all such things including the preparation of plans drawings and specifications and the carrying out of or remedying defects in works as they may deem necessary to secure proper construction of the Highway Works and the Owner shall pay to the County Council the full cost of taking such action including all design supervision construction and administrative costs PROVIDED ALWAYS that before taking any such action as aforesaid the County Council shall give to the Owner written notice of the matter in default and shall take no action thereon until twenty-eight days from the date of such notice shall have elapsed without the Owner or its successors in title remedying fully the matter in respect of which the default has arisen

2.8 This Agreement does not authorise interference with statutory undertakers' apparatus or works without their consent nor the installation or use of telecommunication apparatus without the consent of the owner nor entry upon nor doing works to or on any land other than the highway

2.9 The Developer [and/or the Owner] hereby undertakes and agrees with the County Council that in the event of any claim for compensation or otherwise or costs or charges arising in connection with or incidental to or in consequence of the carrying out of the Highway Works including any such whether mandatory or discretionary which may be incurred by virtue of any enactment or statutory instrument and not otherwise hereby provided it will hold the County Council fully indemnified from and against all claims charges costs and expenses in connection therewith or arising thereout

- 2.10
- (a) All consideration given in accordance with the terms of this Agreement shall be exclusive of any VAT properly payable in respect thereof
  - (b) If at any time VAT becomes chargeable in respect of any supply made in accordance with the terms of this Agreement then to the extent that VAT had not previously been charged in respect of that supply the person making the supply shall have the right to

issue a VAT invoice to the person to whom the supply was made and the VAT shall be paid accordingly

- 2.11 The Owner shall pay to the County Council immediately on demand
- (a) before any part of the Highway Works are begun the sum of [ ] pounds (£[.....]) in respect of costs which may be incurred by the County Council by virtue of clause 2.5
  - (b) the County Council's full legal and administrative costs incurred in the preparation and/or making of temporary traffic regulation orders whether implemented or not to regulate traffic entering or leaving the Site or otherwise occasioned or necessitated by construction of the Development and the full cost of such traffic signs and markings (including labour costs) as the County Council shall deem necessary to give effect to the same as and when any costs have been incurred and within 28 days of receipt by the Owner from the County Council of invoices therefor
  - (c) the Liquidated Damages
- 3 The County Council hereby covenants with the Owner as follows:
- 3.1 The County Council shall set the date for completion of the Highway Works having due regard to the Programme and shall confirm such date in writing to the Owner at the same time as issuing his Letter of Technical Approval
- 3.2 The County Council shall repay to the Owner no later than twenty-eight days following the date of the Completion Certificate issued pursuant to clause 3.3 or such later date as the County Council shall have notified under clause 3.1 the sum deposited under clause 2.11(a) or such part thereof as has not been expended pursuant to clause 2.5
- 3.3 When the Highway Works have been completed in accordance with clause 2.2 including all works described in the Second Schedule to his satisfaction the County Council shall issue the Completion Certificate and thereafter the Owner shall continue to maintain the Highway Works until the Maintenance Certificate is issued in accordance with clause 3.4
- 3.4 The Maintenance Certificate shall be issued by the County Council when the following conditions have been satisfied:
- (a) the Maintenance Period has elapsed
  - (b) all defects that may have become apparent during the Maintenance Period have been remedied and made good by the Owner at its own expense and to the satisfaction of the County Council such defects to include damage or excessive wear caused to the Highway Works during the Maintenance Period
  - (c) the cleansing of all sewers gullies catchpits and manholes and the sweeping of the carriageway and footpaths and the cutting of grass to the reasonable satisfaction of the County Council
  - (d) the Highway Works have been directly connected to a carriageway which is a highway maintainable at the public expense
  - (e) the Highway Works have been provided with proper street lighting traffic signs road markings and street name plates and furniture to the reasonable satisfaction of the County Council
  - (f) that any damage to the Highway Works howsoever caused including (without limitation) acts of third parties has been remedied by the Owner at the Developer at the Owner's cost

- (g) where the surface water sewers other than gullies and connections draining the Highway Works are to be vested in and under the control of the County Council or the Water Authority in accordance with the provisions of the Water Industry Act 1991 written confirmation has been received by the County Council from the appropriate authority that the sewers have been constructed to their satisfaction and have been adopted by that authority
  - (h) the Owner has delivered to the County Council drawings in a format as required by the County Council which the County Council agrees (such agreement not to be unreasonably withheld) show the Highway Works as constructed
  - (i) the Owner has delivered to the County Council the Health and Safety file in relation to the Highway Works in accordance with the Construction (Design and Management) Regulations 1994
  - (j) the Owner has undertaken any remedial works as required by a Stage 3 Safety Audit
- 3.5 The County Council shall from the date of the Maintenance Certificate maintain that part of the Highway Works which constitute alterations and additions to the existing publicly maintainable highway and adopt the remaining Highway Works as part of the highway maintainable at the public expense
- 3.6 Upon the issue of the Completion Certificate the County Council agrees that the Bond shall be reduced by 90%
- 3.7 The County Council shall not settle or agree any amount of compensation to be paid by the County Council as Highway Authority in consequence of any claims made in respect of the Highway Works without first notifying the Owner of such claim, providing the Owner with details of such claim and taking into account any representations made by the Owner
- 3.8 Not to unreasonably withhold or delay any approval consent expression of satisfaction or agreement required under the terms of this Agreement<sup>84</sup>
- 4 The Owner and the County Council agree as follows:
- 4.1 that in the event the Owner has not completed the Highway Works by the date prescribed by the County Council in accordance with clause 3.1 then Liquidated Damages shall become due at the Rate of Liquidated Damages
  - 4.2 that Liquidated Damages payable by the Owner to the County Council shall be the sum equivalent to the Rate of Liquidated Damages applied for each whole day/week for the period between the date prescribed in accordance with clause 3.1 and the date that the Highway Works are actually completed up to a maximum of £[.....]
  - 4.3 that the date of actual completion of the Highway Works (for the purposes of calculating Liquidated Damages under this clause 4 only) shall be the date that the County Council deems it appropriate that the Completion Certificate can be issued whether or not the Completion Certificate is actually issued on that date
- 5 [The Mortgagee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Site shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the

---

84

*Some Council's prefer to have absolute control in relation to some matters. They should be excepted from this clause.*

Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner].

- 6.1 No provisions of this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999
- 6.2 Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions in this Deed
- 6.3 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Site but without prejudice to liability for any subsisting breach arising prior to parting with such interest
- 6.4 This Deed shall not be enforceable against owner-occupiers or tenants of dwellings constructed pursuant to the Planning Permission nor against those deriving title from them

FIRST SCHEDULE

BY THIS BOND (Company Registration Number) whose registered office is situate at ("the Owner")<sup>85</sup> and [...insert name of surety...] (Company Registration Number) whose registered office is situate at [...insert address...] ("the Surety") and their respective successors in title and assigns are bound jointly and severally to the [...] COUNCIL [...insert address...] ("County Council") for the payment to them of the sum of Pounds (£ )

EXECUTED AS A DEED this day of

WHEREAS

- 1 By an agreement dated [...insert date...] relating to [...insert site name...] [and highway works in the vicinity of insert site if this is appropriate] and made between [...insert parties...] and [...insert council name...] County Council ("the Agreement") the Developer [and/or the Owner] covenanted with the Council to carry out the Highway Works as defined and referred to in the Agreement
- 2 It is intended that this Bond shall be construed as one with the Agreement
- 3 The Owner is to carry out the Highway Works as detailed in the Agreement and this Bond is in respect of those Highway Works only as detailed
- 4 At the time of entering into this Bond and on the faith thereof the Surety has agreed to concur with the Owner in this Bond for the due performance and fulfilment of the Highway Works by the Owner as defined and referred to in the Agreement

NOW THE CONDITION of the above written Bond is such that if the Owner his successors and assigns shall carry out the Highway Works as defined and referred to in the Agreement or if on default by the Developer [and/or the Owner] the Surety shall satisfy and discharge the sums due from and payable by the Developer [and/or the Owner] to the Council under the Agreement up to the amount of ..... Pounds (£.....) Then the above written Bond shall be void OTHERWISE to continue in full force and the giving by the Council of any extension of time for the carrying out of the Highway Works as defined and referred to in the Agreement or anything therein mentioned or contained and on the part of the Owner to be performed or fulfilled or any other forgiveness or forbearance on the part of the County Council to the Owner or its successors or assigns shall not in any way release the Surety from the Surety's liability under the above written Bond

THE COMMON SEAL of )  
[INSERT NAME OF OWNER] )  
was hereunto affixed in the presence of: )

Director

Secretary

<sup>85</sup> Add developer is a party to the Highways Agreement

THE COMMON SEAL OF )  
[...insert name of surety...] )  
was hereunto affixed in the presence of: )

Director

Secretary

## SECOND SCHEDULE

Carry out the following highway improvement works and construction of new highway as generally indicated on the Drawings

- 1 Reshape existing carriageway
- 2 Provide highway drainage
- 3 Carry out alterations to existing street lights, provide and erect new as necessary
- 4 Provide road markings, signs and bollards as necessary
- 5 Re-grade and re-seed highway verge where necessary to the reasonable satisfaction of the Director
- 6 All highway drainage
- 7 All other drainage contained in the highway
- 8 All kerbing including kerb foundations and where appropriate including lowering at vehicle crossings and pram-ramps.
- 9 Carriageway sub-base road base and any supporting structures thereto, carriageway base course
- 10 Vision splays and verges
- 11 Pedestrian ways
- 12 Street lighting and street furniture
- 13 Temporary traffic management
- 14 Carriageway wearing course
- 15 Permanent road marking
- 16 Street name plates
- 17 Construction details of the road or roads
- 18 Provide to the Council:
  - (a) As built plans showing the position of services within the road or roads including connections up to the back of footway edging
  - (b) As built plans showing the surface water drainage for the road or roads
  - (c) Plans showing the position of street lighting columns and the associated service cables

- (d) A method statement from the contractors
- (e) Stage 1 2 and 3 safety audits

(Execution of Highways agreement)

THE COMMON SEAL of )  
 [...insert name of owner...] )  
 was hereunto affixed in the presence of: )

Director

Secretary

THE COMMON SEAL of )  
 [...insert name of developer...] )  
 was hereunto affixed in the presence of: )

Director

Secretary

THE COMMON SEAL OF )  
 [...insert name of surety...] )  
 was hereunto affixed in the presence of: )

Director

Secretary

NINTH SCHEDULE

Specification for Community Facilities Floorspace

(Execution of s.106 agreement)

THE COMMON SEAL OF [Local Planning Authority]     )  
was affixed in the presence of:                             )

Authorised Signatory:

THE COMMON SEAL OF [County Council]                     )  
was affixed in the presence of:                             )

Authorised Signatory:

EXECUTED AS A DEED by [...insert name of owner...]     )  
in the presence of:   )

Director:

Director/Secretary:

[...add Developer, mortgagee and any other parties as appropriate...]

## **Annex A: AFFORDABLE HOUSING DRAFTING NOTES**

Simple straightforward affordable housing provisions were included in the First Edition of this model. They are largely retained in the Third Schedule, Affordable Housing Version One. In practice there are many more elaborate arrangements sought by planning authorities and developers. Examples of the issues include

1. A mix of dwelling types
2. Restrictions on the types of occupiers (such as key workers)
3. Nomination rights in favour of a planning authority
4. Protection for the developer if an RSL cannot be found which is willing to take the affordable housing
5. A requirement for particular tenures

Ideas and requirements in affordable housing continue to develop. This Second Edition includes two more sophisticated approaches. They are Versions Two and Three of the Third Schedule "Affordable Housing". The first thing to say about Versions Two and Three is that they are only examples. They are not intended to be prescriptive of the "deal" on affordable housing. The Committee's experience tells us that there are many ways to do affordable housing and that they are constantly being developed. The second point about Versions Two and Three is that they are drawn from actual negotiations. They are not the same as the concluded documents but they do benefit from the practical and legal input of planning solicitors in real commercial situations. We have also drawn attention in footnotes to some of their shortcomings.

Version Two is very full and the following note of explanation should assist. The scheme is that an obligation is placed on the owner to provide the affordable housing units. This has to be in accordance with requirements for numbers, types and tenures. There are restrictions on development until the affordable housing areas are being marketed. The affordable housing land must be put up for tender. Affordable housing providers then make tenders. However, if there is no successful tender the Council is entitled to call for the transfer to it of the affordable housing land. The transfer is for £1. If the Council however does not call for the land then the Owner must nonetheless provide the affordable housing units before certain triggers, in the sense that they must be constructed. There is a positive obligation to occupy the affordable housing units at no less than 33% social rented and no more than 66% intermediate rent or shared ownership, though how one would enforce that if there were no takers is a difficulty. This is a form of cascade.

The Housing Corporation – the model includes a number of references to the Housing Corporation and the registration with them of RSLs. This is because they are drawn from real transactional documents. The Housing and Regeneration Act 2008 makes changes and introduces the concept of registered providers which includes but is wider than RSLs. The Housing Corporation was abolished in December 2008. The model has the usual wording in clause 2.5 which makes references to statutes include their replacements and amendments. So committee has not amended the references to the Housing Corporation. If it were desired to use the new and wider concept of registered providers in a particular case, new drafting would obviously be needed.

The following drafting principles and observations which were included in the First Edition still apply.

- 1 Obligations should be drafted so as to fall within section 106 or they will not be enforceable against persons deriving title from the original covenantor and there may also be difficulties enforcing against the original covenantor.
- 2 There may be another consequence of drafting an obligation which falls outside section 106, as an unenforceable obligation may make the permission itself vulnerable to judicial review.
- 3 It should be borne in mind that obligations under section 106 last in perpetuity unless varied pursuant to section 106A or section 106B or unless drafted with some limitation.
- 4 A mix of dwelling types (e.g. two bedroom units or three bedroom units) can be achieved by an obligation requiring specified operations to be carried out over the land (section 106(1)(b)) or by a restriction on occupation unless the mix is achieved, pursuant to section 106(1)(a).
- 5 A requirement for occupation by types of occupiers can be achieved by a restriction on use by anyone other than those occupiers (section 106 (1)(a)).

- 6 A simple requirement that an RSL gives nomination rights to the local planning authority will not fall within section 106. However, a restriction on occupation other than by a person chosen pursuant to a nomination agreement in a form annexed to the agreement would fall within section 106 (1)(a).
- 7 A simple obligation that dwellings are only disposed for example by way of shared equity leases or assured tenancies will not fall within section 106. An approach linked to a restriction on occupation will fall within s.106 but in formulating any additional controls local authorities should be mindful of any genuine commercial or practical difficulties.
- 8 Mortgagees of affordable dwellings may have requirements for what is acceptable to them in order to protect their interests in securing the repayment of the loan. Restrictions on assignment which affect the value and realisability of an affordable dwelling may reduce the availability of mortgages. Reasonable time limits for exercise of nomination rights and fallback into the open market in the case of failure to nominate are among the potential solutions
- 9 It will often be possible to overcome mortgagee objections by providing that restrictions do not apply to mortgagees in possession of individual units or sales by them. Careful attention to the terms of s.106(4) and 106(2) is advisable.
- 10 Whilst it is common to exclude residential owner occupiers and lessees from some liabilities in planning agreements a rigid requirement by mortgagees (or any party to the agreement) that section 106 agreements do not apply at all to owner occupiers or lessees will undermine for example provisions restricting occupation to key workers and restrictions on occupation of more than a given number of houses pending provision of affordable housing or other facilities.