

**(Offsite S106 BNG AGREEMENT-standalone (Habitat Banks not linked to a planning permission))**

Dated \_\_\_\_\_ 2025

**CHESHIRE WEST AND CHESTER BOROUGH COUNCIL (1)**

and

[ ] [Owner]

and

[ ] [BNG Site Operator]

and

[ ] [the Mortgagee]

Planning Obligation by Deed of Agreement  
under Section 106 of the Town and Country Planning Act 1990  
relating to land at [ ]



**Cheshire West  
and Chester**

Head of Legal Services  
Cheshire West and Chester Borough Council  
The Portal, Wellington Road, Ellesmere Port, CH65 0BA

Reference: [ ]

**PARTIES**

- (1) **CHESHIRE WEST AND CHESTER BOROUGH COUNCIL** of the Portal, Wellington Road, Ellesmere Port, CH65 0BA ("the Council")
- (2) [ ] ("the Owner")
- (3) ...[ ] ("the BNG Site Operator")
- (4) [ ] ("the Mortgagee")

**INTRODUCTION**

- A** The Council is the local planning authority for the area in which the BNG Site is situated.
- B** The Owner is the proprietor of the freehold interest in the land registered at HM Land Registry with [absolute/possessory] title under title number XXX (**title number**) which comprises the BNG Site.
- C** The Owner is proposing to register the BNG Site on the BNG Register.
- D** [The BNG Site Operator is the ....]
- E** The Mortgagee is the chargee of the BNG Site under Legal Charge dated XXX (**provide date of the charge**) registered at HM Land Registry in Charges Register of title[s] XXX (**provide numbers of titles**).
- F** The Parties have agreed to enter into this Deed in order to secure the planning obligations contained in this Deed with the intention that the planning obligations contained in this Deed may be enforced by the Council against the Owner [,the BNG Site Operator] [its] [their] (**delete as applicable**) successors in title and assigns to the BNG Site and to secure the provision, management and maintenance of Biodiversity Units on the BNG Site.

## NOW THIS DEED WITNESSES AS FOLLOWS:

### 1. DEFINITIONS

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

**“Act”**

means the Town and Country Planning Act 1990 (as amended);

**“Allocation”**

means attributing any Biodiversity Units or parts of the BNG Site by the Owner [the BNG Site Operator] towards a development's requirement to deliver biodiversity and the words **“Allocated”** and **“Allocation”** shall be construed accordingly.

***(Delete if Bond is not used)* “Acceptable Surety”**

means:

(a) a bank or financial institution that has a rating for its long-term debt obligations of B or higher by S&P Global Ratings or B or higher by Moody's Investors Services (or in each case any successor to their respective rating business) or a comparable rating from an internationally recognised credit rating agency; or

(b) any other bank or financial institution of good commercial standing, acceptable to the Council.]

**Approved Professional**

means a professional individual who is a member of the Chartered Institute of Ecology and Environmental Management (CIEEM) or such other institute or body with ecological and environmental accreditation to be approved in writing by the Council;

***(delete if a bond is not used)* [“Biodiversity Bond”**

means a bond in a form reasonably acceptable to the Council provided by an Acceptable Surety in the sum of XXX (**amount in words**) (£XXX) (**amount in numbers**) Index Linked (which for avoidance of any doubt shall include a sum for professional fees that may be

incurred in association with the Biodiversity Bond) to enable the Council to take such steps as shall be reasonably necessary in the case of a Default Event;]

***(delete if a Deposit is not used)* [“Biodiversity Deposit”**

means the sum of XXX (***amount in words***) (£XXX) (***amount in numbers***) Index Linked (which for avoidance of any doubt shall include a sum for professional fees that may be incurred in association with the Biodiversity Deposit) to be deposited with the Council on or prior to the date of this Deed to enable the Council to take such steps as shall be reasonably necessary in the case of a Default Event;]

**“Biodiversity Metric”**

means the statutory biodiversity metric accounting tool specified as such by the Department for Environment, Food & Rural Affairs (DEFRA) or Natural England pursuant to paragraph 4 of Schedule 7A to the Act or any other replacement of this metric. For the purposes of this Deed the biodiversity metric is xxxxxxxx dated xxxxxxxx appended to this Deed at Appendix 2 within Appendix xxxxx (which may be varied from time to time with the written agreement of the Parties);

**“Biodiversity Net Gain”**

means an increase in Biodiversity Units resulting from implementing the Habitat Management and Monitoring Plan that can be allocated to a development to fulfil its requirement to create or enhance biodiversity under schedule 7A of the Act;

**“Biodiversity Units”**

means the units of biodiversity value in the BNG Site as measured by the Biodiversity Metric which are set out in the Habitat Management and Monitoring Plan and are necessary towards achieving Biodiversity Net Gain;

**“BNG Commencement Notice”**

a written notice served by the Owner [BNG Site Operator] on the Council, which identifies the date of commencement of the BNG Works on the first Biodiversity Unit on the BNG Site to be created or enhanced;

### **“BNG Management and Regulatory Compliance Fee”**

means the sum of XXXX (***amount in words***) (£XXX) (***amount in number***) Index Linked from the date of this Deed to be paid by the Owner to the Council towards the Council’s costs of:

- a) monitoring compliance with the Habitat Management and Monitoring Plan;
- b) reviewing the BNG Monitoring Reports;
- c) anything else associated with monitoring and ensuring compliance with the obligations relevant to the BNG Works;

### **“BNG Monitoring Reports”**

means the monitoring report(s) to be prepared by an Approved Professional and submitted by the Owner [BNG Site Operator] to the Council in accordance with paragraph 11 of the First Schedule, which shall include, as a minimum, the following headings:

- (a) assessment of the Biodiversity Units at the time of each BNG Monitoring Report is submitted against the objectives defined in the approved Habitat Management and Monitoring Plan as demonstrated by an updated Biodiversity Metric calculation;
- (b) the condition and extent of growth of the Biodiversity Units using indicators in the approved Habitat Management and Monitoring Plan, including timescales together with any other notes of interest;
- (c) date-stamped photographs accompanied by detailed site notes on the extent of growth and condition of the Biodiversity Units at the date of each BNG Monitoring Report;
- (d) detailed specific recommendations (where appropriate) on management actions to achieve the target condition of the Biodiversity Units at the time of the BNG Monitoring Report including timescales for undertaking actions and marked site plans to show the actions;

### **“BNG Register”**

means the register of Biodiversity Gain Sites established pursuant to section 100 of the Environment Act 2021 and maintained by Natural England;

**“BNG Site”**

means the land at XXXX (***description of the offsite land which will be subject to the S106 agreement***) which is xxxxx hectares in size where the BNG Works will be undertaken and the Biodiversity Units will be created/enhanced, managed and maintained in accordance with the Habitat Management and Monitoring Plan, shown edged red on the BNG Site Plan and being registered at HM Land Registry with absolute title under title number XXX (***title number for the BNG Site***);

**“BNG Site Manager”**

means the organisation, company or individual appointed or to be appointed by the Owner in respect of the BNG Site who will be an Approved Professional who will have the responsibility for the implementation management and maintenance of the Biodiversity Units in accordance with the Habitat Management and Monitoring Plan, including any person who shall be the point of contact for the Council regarding the management of the BNG Works;

**“BNG Site Plan”**

means the plan titled XXX (***title of the plan***) numbered (***reference number of the plan***) attached to this Deed at Appeni showing the BNG Site;

**“BNG Works”**

means the works set out in the Habitat Management and Monitoring Plan that are directed towards creating/enhancing the Biodiversity Units (excluding any management or monitoring activities specified in the Habitat Management and Monitoring Plan) required for achieving Biodiversity Net Gain (***delete if not applicable***);

**“BNG Works Completion Certificate”**

means a certificate served by the Council under paragraph 1.1.1 of the First Schedule;

**“BNG Works Completion Date”**

means the date when the BNG Works Completion Certificate is issued by the Council;

**“BNG Works Completion Notice”**

means a written notice to be served by the Owner [BNG Site Operator] to the Council to

declare the completion of the BNG Works as provided in paragraph 6.2 of the First Schedule to include as a minimum:

- (a) a description of the BNG Works referred to in the notice;
- (b) a plan to show the BNG Works referred to in the notice; and
- (c) any further information specified in the Habitat Management and Monitoring Plan;

**“Bundling”**

the sale of a single Biodiversity Unit representing several different environmental benefits, but which does not involve Double Counting;

**“Deed”**

means this agreement;

**“Default Event”**

means

- (a) a failure to achieve an objective of the Habitat Management and Monitoring Plan; or
- (b) the Post-Development Biodiversity Value falling below that stated in the Habitat Management and Monitoring Plan and/or
- (c) a fundamental breach of the obligations contained in the First Schedule, which is a breach resulting in habitat destruction or habitat failure in respect of one or more Biodiversity Units (and for the avoidance of doubt this shall not be deemed to have arisen where the Habitat Management and Monitoring Plan has been fully complied with)
- (d) an Insolvency Event

as disclosed by a BNG Monitoring Report or otherwise;

**“Double Counting”**

means the Sale or Transfer of the same Biodiversity Unit more than once as the basis for duplicated claims of biodiversity gain;

### **“Expert”**

means an independent professional (with no potential conflict of interest) with the appropriate expertise and relevant qualifications and a minimum of five (5) years experience in the subject matter of the dispute to be appointed in accordance with the criteria in clause 19;

### **“Force Majeure Event”**

a circumstance, event or clause which is not within the control of the Owner [BNG Site Owner] comprising (a) an act of God, (b) fire, earthquake or explosion, (c) war, invasion hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest;

### **“Habitat Management and Monitoring Plan (HMMP)”**

means a plan (which may be varied from time to time with the written agreement of the Parties) for the provision, management and maintenance of the BNG Works on the BNG Site (***NB if the plan has been submitted and approved use the following***) [which plan has been submitted to and approved in writing by the Council and is appended hereto at Appendix 3] OR (***NB: if not submitted yet use the following***) [which plan will be submitted to and approved in writing by the Council and will contain as a minimum all the headings and information included in the “Natural England’s Habitat Management and Monitoring Plan” Template v.01 November 2023 or any updated version or replacement of this template by Natural England and which plan may also include information about:

1. how any amendments to the plan will be agreed and implemented,

[2. details of the financial mechanism to be put in place to ensure that sufficient funding is available at all times to secure that the BNG Works are managed and maintained following the approved HMMP at no cost to the Council]

### **“Index”**

means the All-Items Index of Retail Prices issued by the Office for National Statistics (or any successor index issued by any successor organisation) and **“Index Linked”** shall be construed accordingly;

### **“Insolvency Event”**

means, in respect of the Owner [and/or BNG Site Operator]:



- (a) a winding-up order is made by the Court;
- (b) an administrator is appointed under the provisions of Schedule B1 of the Insolvency Act 1986;
- (c) a receiver, liquidator, provisional liquidator, administrative receiver is appointed in respect of it, or any of its assets;
- (d) a resolution is passed for its winding up, liquidation or reorganisation (save for the purposes of a solvent reorganisation);
- (e) an order is made for a moratorium under Part A1 and Schedule ZA1 of the Insolvency Act 1986; or
- (f) a bankruptcy order is obtained against an individual under part IX of the Insolvency Act 1986.

**“Interest”**

means interest at four (4) per cent above the base lending rate of Lloyds Bank Plc from time to time;

**“Legal Additionality Test”**

the requirement that a Biodiversity Unit is not provided to meet an existing regulatory obligation on the part of the Owner as referred to in the Nature Markets Publication;

**“Maintenance Period”**

means a period of thirty (30) years from the BNG Works Completion Date;

**“Natural England”**

means the public body known as Natural England or any successor body or any organisation replacing Natural England, which acts as the Government’s advisor for the natural environment in England;

## **“Parties”**

means the parties to this Deed being the Council, the Owner [, the BNG Site Operator] [,the Mortgagee] (***delete as appropriate***) (which expressions shall also include their successors in title and assigns) and **“Party”** shall be construed accordingly;

## **(only use if you use Default Event) [“Post – Development Biodiversity Value”**

means the biodiversity value of the BNG Site following completion of the BNG Works calculated following the Biodiversity Metric;]

## **“Relevant Event”**

means any of the following events:

- a) a change in the law and/or national policy; or
- b) a decision of a Court, tribunal, Secretary of state or other decision maker with competence that results in Biodiversity Net Gain not being required by law or the BNG Site no longer being considered to be an effective form of the Biodiversity Net Gain”

## **“Sale/Sold”**

the exchange of any Biodiversity Unit or part thereof to a third party for a monetary value;

## **“Stacking”**

the use of different credits or units for different ecosystem services for the same piece of land to achieve multiple environmental outcomes, but which does not involve Double Counting;

## **[“Step-in Costs”]**

means the costs incurred by the Council in the exercise of Step-In Rights including legal and other administrative costs;]

## **[“Step-in Rights”**

means the right of the Council in the case of a Default Event to enter with or without workers, vehicles, plant machinery onto the BNG Site to take such steps as may be reasonably necessary to ensure that the provisions of the HMMP are fully complied with;]

### **“Transfer/Transferred”**

the exchange of any Biodiversity Unit or part thereof to a third party for any arrangement other than a monetary value;

### **“Working Day”**

means any day from Monday to Friday (inclusive) which is neither Christmas Day nor Good Friday nor a bank or public holiday in England.

## **2. CONSTRUCTION OF THIS DEED**

- 2.1. Unless otherwise indicated, references to clauses and Schedules are to clauses of and Schedules to this Deed, and references in a Schedule to a Part or paragraph are to a Part or paragraph of that Schedule.
- 2.2. Words importing the singular meaning where the context so admits include the plural meaning and vice versa.
- 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 wherever more than one Party undertakes an obligation all their obligations can be enforced against all of them jointly and against each individually 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 one deriving title through or under that Party and in the case of the Council the successors to its statutory functions.

- 2.7. Any covenant not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing.
- 2.8. References to the BNG Site shall include any part of it.
- 2.9. The headings are for reference only and shall not affect construction.
- 2.10. A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.

### **3. LEGAL BASIS**

- 3.1. This Deed is made pursuant to Section 106 of the Act and Section 111 of the Local Government Act 1972, and Section 1 of the Localism Act 2011.
- 3.2. The covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations under Section 106 of the Act and are enforceable by the Council as local planning authority against the Owner and to the extent that any of the obligations are not planning obligations within the Act they are entered into under the powers contained in Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 and all other enabling powers.

### **4. CONDITIONALITY**

- 4.1. The provisions of this Deed shall come into full force and effect immediately upon completion of this Deed.
- 4.2. Where a Relevant Event occurs, the obligations in clause 5 (Owner's covenants) shall not apply in relation to any parts of the BNG Site which have not been Allocated at the date of the Relevant Event and the Parties may be required to enter into a deed of variation/supplemental deed as agreed between the Parties to release the relevant part of the BNG Site from the obligations set out in this Deed.
- 4.3. This Deed may be terminated by agreement in writing between the Parties.
- 4.4. A Modification Notice may only be served by the Owner in respect of the BNG Site where there are Biodiversity Units yet to be Sold or Transferred.

- 4.5 Upon receipt of a Modification Notice the Council shall confirm to the Owner in writing within 20 (twenty) Working Days whether the Modification Notice is valid.
- 4.6 As soon as reasonably practicable the Parties shall agree a form of variation to this Deed to reflect the updated position and the Owner shall pay the Council's reasonable costs in relation to the variation of this Deed.
- 4.7 Upon completion of the deed of variation pursuant to clause 4.6 and receipt of confirmation of the relevant local land charge registration from the Council, the Owner shall forthwith apply to Natural England for the removal of the relevant part of the BNG Site from the BNG Register and provide evidence to the Council immediately on completion of such registration.
- 4.8 For the avoidance of doubt where such a Modification Notice is served on the Council this Deed will continue in full force and effect in respect of any Biodiversity Units already Sold or Transferred at the date of the Modification Notice.

## **5. OWNER'S COVENANTS**

- 5.1. Subject to clause 4, the Owner [and the BNG Site Operator] covenants with the Council (so as to bind the BNG Site):
- 5.1.1. to fully observe and perform the obligations in this Deed as set out in the First Schedule and hereby agree that the BNG Site shall be subject to the obligations, restrictions and covenants herein.
  - 5.1.2. that there are no interests (legal or equitable) required for the purposes of section 106 of the Act in the BNG Site other than detailed in this Deed;
  - 5.1.3. not to encumber or otherwise deal with its interest in the BNG Site or any part or parts thereof in any manner whatsoever whereby the obligations, covenants and undertakings imposed by this Agreement are rendered impossible to carry out;
  - 5.1.4. that no part of the BNG Site is subject to any constraints, including but not limited to restrictive covenants, planning conditions, hydrology, flooding, archaeology and/or contamination that would be reasonably capable of affecting its suitability as a BNG Site and the BNG Works and

management required to achieve the target Biodiversity Units, which have not been disclosed in writing to the Council prior to the completion of this Deed.

- 5.1.5. without prejudice to the Council's statutory rights of entry, the Council and its authorised employees and agents, with or without workers, vehicles, plant and machinery shall, upon reasonable written notice, be permitted to enter the BNG Site at all reasonable times to verify whether or not any obligation arising hereunder has been performed or observed.
- 5.2. The Owner [and the BNG Site Operator] shall indemnify the Council for any reasonable expenses or liability necessarily incurred due to a breach by the Owner [and the BNG Site Operator] of any obligations contained in this Deed.
- 5.3. The Owner shall ensure that any works requiring planning approval, licence, consents or otherwise shall be obtained prior to commencing the relevant BNG Works.

## **6. [MORTGAGEE]**

- 6.1. The Mortgagee consents to this Deed being entered into with the intention that their interests in the BNG Site in the form of the registered charge detailed in Recital C of this Deed will be bound by the terms of this Deed as if this Deed had been executed and registered as a local land charge before the execution of the registered charge.
- 6.2.1 Notwithstanding clause 6.1, the Mortgagee (or any other mortgagee or chargee with a charge over the BNG Site) will not incur any liability for any breach of the obligations contained in this Deed unless and until it becomes a mortgagee or chargee in possession of the BNG Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner.】

## **7. COUNCIL'S COVENANTS**

- 7.1. The Council covenants with the Owner [and the BNG Site Operator] as set out in the Second Schedule.

## **8. MISCELLANEOUS**

8.1. The Owner [and/or the BNG Site Operator] shall pay to the Council on completion of this Deed:

8.1.1. *(delete if BNG MF is paid later)* [the BNG Management and Regulatory Compliance Fee; and]

8.1.2. the reasonable costs of the Council incurred in the negotiation, preparation and execution of this Deed.

8.2. Where the Owner [and/or the BNG Site Operator] requires the agreement, approval, consent, or expression of satisfaction from the Council under the terms of this Deed, such agreement, approval, consent, or expression of satisfaction shall not be unreasonably withheld or delayed and shall be given in writing and on behalf of the Council by the Head of Planning and Placemaking unless as otherwise agreed by the Parties.

8.3. 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, legality or enforceability of the remaining provisions of this Deed.

8.4. Save as provided in respect of successors in title to the BNG Site or any successor to the relevant statutory function of the Council no provisions of Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999.

## **9. EXCLUSIONS**

9.1. This Deed does not apply in any way to:

9.1.1. any person who ceases to have an interest in the BNG Site but without prejudice to liability for any subsisting breach arising before cessation; or

9.1.2. any statutory undertaker or another person who acquires any part of the BNG Site or interest therein solely for the purpose of drainage or sewerage or the supply of electricity, gas, water or telecommunications PROVIDED THAT if a statutory undertaker acquires any part of the BNG

Site for such purposes the Parties agree that, within 3 (three) months of such acquisition the Council shall be entitled to require the Owner to provide replacement Biodiversity Units on the BNG Site (or if this is not practicable on land in the Council's administrative area, the precise location of which is to be confirmed in writing by the Council) in place of any lost Biodiversity Unit(s) as a result of such acquisition which had previously been Sold or Transferred (which shall be of an equivalent number, type and level of enhancement to those lost).

## **10. INDEXATION**

- 10.1. Any sum referred to in this Deed shall be increased by an amount equivalent to the increase in the Index from the date hereof until the date on which such sum is paid.

## **11. INTEREST**

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

## **12. VAT**

- 12.1. All consideration given following the terms of this Deed shall be exclusive of any value-added tax properly payable.

## **13. NOTICES**

- 13.1. Any notice, demand or other communication to be delivered to a Party under this Deed shall be in writing or via email and shall be marked for the attention of the person from time to time designated by the other Parties. The initial details so designated are as follows:

13.1.1. The Council: [section106@cheshirewestandchester.gov.uk](mailto:section106@cheshirewestandchester.gov.uk)  
[biodiversity@cheshirewestandchester.gov.uk](mailto:biodiversity@cheshirewestandchester.gov.uk) quoting reference [ ].

13.1.2. The Owner: [ ].

13.1.3. The BNG Site Operator:



- 13.1.4. The Mortgagee:
- 13.2. Subject to clause 13.3 below and unless the date and/or time of actual receipt is proven by a notice, demand or other communication sent by the following means is to be treated as having been served as follows:
- 13.2.1. If delivered by hand at the time of delivery;
- 13.2.2. If sent by pre-paid first class post on the second Working Day after posting;
- 13.2.3. If sent by recorded delivery at the date and time delivery was signed for;
- 13.2.4. If sent by email on the day when the Council has provided acknowledgement of receipt.
- 13.3. If a notice, demand or other communication is served after 4.00 pm on a Working Day or on a day that is not a Working Day it is to be treated as having been served on the next Working Day.

#### **14. CHANGE IN OWNERSHIP**

- 14.1. The Owner agrees with the Council to give the Council immediate written notice of any change in ownership of any of its interests in the BNG Site occurring before all the obligations under this Deed have been discharged
- 14.2. Such notice under clause 14.1 shall include details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the BNG Site purchased by reference to a plan.

#### **15. LAND REGISTRY AND LOCAL LAND CHARGES**

- 15.1. [For the purpose of noting this Deed on the registered title of the Owner registered at HM Land Registry under title number XXX (***provide the title number***) the Owner shall at its own cost within fifteen (15) Working Days of completion of this Deed submit an application to HM Land Registry to enter an agreed notice by filing a completed AN1 form (or any replacement/alternative version of this form) together with the application fee and on doing so will provide proof of such filing to the Council. ]

- 15.2. This Deed shall be registered in the Council's register of local land charges on completion thereof.
- 15.3. Following the performance and satisfaction of all the obligations contained in this Deed the Council shall upon written request of the Owner [and/or the BNG Site Operator], provide written confirmation of its discharge PROVIDED THAT should the request require formal cancellation of all entries made in the register of local land charges in respect of this Deed (which may only be done by way of a further deed) the person making such request shall pay the Council's reasonable legal costs in relation to the supplemental deed.

## **16. DELIVERY**

The provisions of this Deed shall come into full force and effect on completion of this Deed.

## **17. FORCE MAJEURE**

- 17.1 Subject to clauses 17.2 and 17.3 the [Owner] shall not be liable for any failure or delay in performing any of its obligations under this Deed for so long as, and to the extent that, its performance is directly prevented, hindered, or delayed by a Force Majeure Event.
- 17.2 The [Owner] shall immediately notify the Council in writing of the start of a Force Majeure Event and shall use all reasonable endeavours to limit the effect of the Force Majeure Event on the performance of its obligations under this Deed.
- 17.3 Within (6) six months of the date of notification pursuant to clause 17.2 above (or such longer period as specified by the Council) the [Owner] shall, in agreement with the Council's Ecologist prepare an updated/alternative HMMP. The [Owner] shall then implement and maintain this plan at their own cost and expense in accordance with the specific timescales outlined in the updated/alternative HMMP. **FOR THE AVOIDANCE OF DOUBT** the number of Biodiversity Units, type and level of enhancement to be achieved need not equate to that provided for in the original HMMP but will allow for what is reasonable in terms of the remaining Maintenance Period.

- 17.4 In the event that the updated/alternative HMMP (including the number of Biodiversity Units, type and level of enhancement to be achieved) is not agreed between the Parties within the 6 (six) month period specified in clause 17.3 (or such longer period as specified by the Council) the matter shall be put to an Expert to determine in accordance with Clause 19 hereof.

## **18. WAIVER AND FETTER**

- 18.1. No waiver (whether expressed or implied) by the Council 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 from enforcing any of the relevant terms or conditions or acting upon any subsequent breach or default.
- 18.2. Nothing in this Deed restricts or is intended to restrict the proper exercise at any time by the Council of any of its statutory powers, functions or discretions in relation to the BNG Site or otherwise.

## **19. DISPUTE RESOLUTION**

- 19.1 No Party may elect to refer a dispute to an Expert for resolution in accordance with clause 19.2 to 19.11 unless they shall first have used reasonable endeavours for a period of not less than two (2) months after the date upon which the dispute or breach was first notified in writing by one Party to another to mediate the dispute through appropriate representatives from within the respective organisations.
- 19.2 Subject to the requirements of clause 19.1 above being complied with, in the event of any dispute or difference arising between the Parties relating to the terms of this Deed (including but not limited to any question regarding its breach, existence, validity or termination of the legal relationships established by this deed), one Party may by serving notice on all other Parties (**the “Notice”**) require the dispute or difference to be referred to an Expert for determination.
- 19.2.1 The Notice must specify:
- 19.2.2 the nature, basis and brief description of the dispute;
- 19.2.3 the clause or paragraph of a schedule or appendix in the Deed pursuant to which the dispute has arisen; and
- 19.2.4 the details of the proposed Expert and the number of Experts if there is more than one issue in dispute;
- 19.2.5 the outcome of the negotiations as required by clause 19.1.

- 19.3 The Expert will be selected and appointed by the Council within three (3) months of the date that the Notice is served pursuant to clause 19.2 above in accordance with the following criteria:
- 19.3.1 if such dispute relates to matters concerning the construction, interpretation and/or the application of this Deed, the Chairman for the time being of the Bar Council to nominate the Expert;
  - 19.3.2 if such dispute relates to matters requiring a specialist ecologist, the President for the time being of the Chartered Institute of Ecology and Environmental Management to nominate the Expert;
  - 19.3.3 if such dispute relates to matters requiring a specialist chartered surveyor, the President for the time being of the Royal Institution of Chartered Surveyors to nominate the Expert;
  - 19.3.4 if such dispute relates to matters requiring a specialist chartered accountant, the President for the time being of the Institute of Chartered Accountants in England and Wales to nominate the Expert; and
  - 19.3.5 in all other cases, the President for the time being of the Law Society of England and Wales to nominate the Expert as he considers appropriate.
- 19.4 On acceptance of the appointment the Expert will provide to the Parties a practicable and achievable timescale for the delivery and communication of the decision allowing for the nature and complexity of the dispute.
- 19.5 Unless the Expert shall direct to the contrary, within twenty-eight (28) Working Days after his appointment the Expert shall invite written submissions from the Parties to the dispute together with a bundle of key documents relied upon and shall afford to each of the said Parties an opportunity to make counter submissions in writing within a further ten (10) Working Days in respect of such submissions or such other timescales as agreed between the Expert and the Parties.
- 19.6 The Expert shall fully consider all submissions and evidence when making his decision and the Expert may consider that oral representations by way of a hearing are required.
- 19.7 The Expert's decision shall be given in writing and shall give reasons for it. The Expert's decision shall be final and binding on the said Parties in the absence of manifest error.
- 19.8 The Expert shall act as an expert and not as an arbitrator and his decision will (in the absence of manifest error) be binding on the Parties. He shall consider any written representations submitted to him in accordance with the timescales specified in this clause as well as oral evidence representations (if required) and shall not be in any way limited or fettered thereby and shall determine the dispute in accordance with his own judgement.
- 19.9 The Expert shall use all reasonable endeavours to give his decision and the reasons for it as expeditiously as possible.

- 19.10 The Expert may award the costs of the dispute resolution in such proportions as he sees fit but in the absence of an express award to this effect the costs shall be payable by the Parties to the dispute equally. In the event that the Expert appoints an assessor to assist him in his determination then the costs of the assessor shall be payable by the Parties to the dispute equally unless the Expert determines they should be otherwise apportioned. Each Party shall bear its own costs for making written submissions in accordance with clause 19.5 above.
- 19.11 Nothing in this clause shall be taken to fetter the Parties' ability to seek legal redress or commence proceedings in the courts (or otherwise) for any breach of the obligations in this Deed (including but not limited to an application for declaratory relief, injunction, specific performance, payment of any sum of money, damages and any other means of enforcing the Deed together with consequential and interim orders and relief).

## **20 JURISDICTION**

- 20.1 This Deed is governed by and shall be interpreted in accordance with the laws of England.

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

## **FIRST SCHEDULE**

### **Owner's [and/or BNG Site Operator's] Covenants**

#### **Notifications**

1. The Owner [and/or BNG Site Operator] covenants with the Council as follows:
  - 1.1. Prior to commencement of the BNG Works:
    - 1.1.1. to submit to the Council the BNG Commencement Notice within five (5) Working Days of the commencement of the works occurring;
    - 1.1.2. to appoint a BNG Site Manager and thereafter to retain a BNG Site Manager throughout the duration of this Deed, having notified the Council of any changes to their identity or contact details in writing within twenty-eight (28) days of any such change taking place;
    - 1.1.3. not to commence any BNG Works until they have complied with the obligations under 1.1.1 and 1.1.2 above;
    - 1.1.4. subject to 1.1.3 above to commence the BNG Works no later than twelve (12) months from the date of this Deed;

#### **[(delete if no Bond/Deposit is provided) [Biodiversity Bond/Deposit]**

2. [Prior or on submitting the BNG Commencement Notice to [deposit] [provide] with the Council the Biodiversity [Deposit] [Bond] and not to commence any BNG Works until such payment has been [made] [provided];]
3. Where an Insolvency Event occurs in relation to the Owner [the BNG Site Operator], it shall allow the Council to call on the Biodiversity [Bond] [Deposit] and recover all costs incurred and expected to be incurred in exercising its Step-In Rights contained in this Deed.]

#### **Allocation**

4. To notify the Council when:
  - 4.1. The first Biodiversity Unit is Allocated and
  - 4.2. The last Biodiversity Unit is Allocated.

### **Access for Inspection**

5. From the commencement of the BNG Works, to allow on reasonable notice and at reasonable times all the persons duly authorised by the Council, its agents, and contractors with or without workmen and equipment
- 5.1. To enter the BNG Site for the purposes of monitoring compliance with the HMMP and this Deed (subject to appropriate health and safety measures if livestock are situated on the BNG Site) and
- 5.2. Pass and repass across any land in the Owner's control which is necessary to gain access to for the purpose of accessing the BNG Site in accordance with paragraph 5.1.

### **Creation/completion of BNG Works**

6. The Owner covenants with the Council to:
  - 6.1. complete the BNG Works in accordance with the HMMP;
  - 6.2. serve the BNG Works Completion Notice on the Council no less than ten (10) Working Days before the actual completion date of the BNG Works.
7. On receipt of the Council's written notification to request remedial works, following paragraph 1.1.2 of the Second Schedule of this Deed, to complete the specified remedial works at the specified by the Council timeframes and as soon as reasonably practicable after completion of such remedial works, to issue a further BNG Works Completion Notice and thereafter continue to rectify any defects and issue a Completion Date Notice until the Council issues a BNG Works Completion Certificate.

### **Maintenance of the Biodiversity Unit(s)**

8. On receipt of the BNG Works Completion Certificate, to manage and maintain the Biodiversity Units in accordance with the HMMP and for no other purposes inconsistent with the requirements of the HMMP for the Maintenance Period;
9. not to :

9.1 create or cause or permit any encumbrance to the registered title to the BNG Site; or

9.2 execute, renew or extend (nor cause or permit the execution, renewal or extension of) any lien, license or similar interest that may reasonably affect the maintenance of the BNG Site in accordance with the HMMP, without the prior written consent of the Council PROVIDED THAT this obligation shall cease to apply on the expiry the Maintenance Period in respect of the final tranche of the BNG Works.

10. to ensure that in accordance with government guidance, all Biodiversity Units Sold or Transferred, or available for sale or Transfer, on the BNG Site shall at all times meet the Legal Additionality Test and that there is no Double Counting of any Biodiversity Unit PROVIDED THAT FOR THE AVOIDANCE OF DOUBT Bundling or Stacking of environmental credits or units will be permitted.

### **BNG Monitoring Reports**

11. to submit BNG Monitoring Reports in respect of the BNG Works to the Council during the Maintenance Period on the first (1st), second (2nd), fifth (5th), tenth (10th), twentieth (20th) and thirtieth (30<sup>th</sup>) anniversaries (***check instructions whether additional monitoring points need to be added for more complex habitats***) from the BNG Works Completion Date or in accordance with such other timescale and frequency as shall be set out in the HMMP agreed in writing with the Council;

12. Within ten (10) Working Days of receipt of any written notice from the Council under paragraph 2 of Schedule 2, to implement the remedial measures at the specified by the Council timeframes and at their own cost and expense as soon as reasonably practicable but in any case no later than 20 Working Days from receipt of the Council's notification.

### **Modification of HMMP**

13. To notify the Council of any requested amendment to the HMMP, such notice to include:

13.1 the proposed amended HMMP;

13.2 a statement of reasons for such amendment; and

13.3 confirmation (with reasons) that the amendment would not prejudice:



13.3.1 the use or management of the BNG Site in a manner consistent with its function to deliver Biodiversity Net Gain; and

13.3.2 the continued functioning of the BNG Site for Biodiversity Net Gain or any existing Allocation.

14. Where the Council agrees (or the Expert determines) that an amended HMMP is approved under paragraph 13.1 of this Schedule, to:

14.1 apply to the BNG Register as soon as reasonably practicable where necessary to reflect the amendments taken place in the amended HMMP; and

14.2 keep the Council informed of the progress of the application and take all reasonable steps to conclude it (including correcting and re-submitting it where necessary).

**[Default event/Step-in Rights]**

15. On receipt of the Default Notice, to notify the Council within twenty (20) Working Days of service of the Default Notice whether the Owner [BNG Site Operator] accepts or disputes the notice;

16. Where it notifies the Council that it disputes the Default Notice:

16.1 to include a reasoned response in the notice under paragraph 16 (if disputing the Default Notice); and

16.2 it may request, within ten (10) Working Days of any time limit in the Default Notice (or other extended timeframe as agreed with the Council in writing), that the matter be referred for determination by an Expert;

17. Where it has notified the Council that it accepts a Default Notice (or the Expert has determined that it is valid), to

17.1 comply with the requirements of the Default Notice within the time limits specified by the Default Notice (or other extended timeframe as agreed with the Council in writing);

17.2 use reasonable endeavours to agree the following with the Council within twenty (20) Working Days of notifying the Council that it accepts the Default Notice:

17.2.1 the steps required to remedy the breach; and

17.2.2 if applicable, any remedial works;

17.3 commence and diligently proceed to remedy the breach within the time period specified in the Default Notice (or such other period as may be agreed with the Council;

17.4 comply with any requirements imposed on the Owner [BNG Site Operator] in connection with a Default Notice by the Expert within the time limits specified in the Expert's determination;

18. Where it has failed to comply with a time limit of the Default Notice or Expert's determination in respect of a Default Notice, to allow the Council, its agents, and contractors with or without workmen and equipment to enter:

18.1 the BNG Site; and

18.2 other land in the Owner's [BNG Site Operator] control needed to access the BNG Site, at all reasonable times to carry out works reasonably necessary to comply with the requirement of the Default Notice or the Expert's determination;

**[In case no deposit or Bond has been paid]** 18.3 To pay the Council within fifteen (15) Working Days of the date of such notification either:

18.3.1 the sum which the Council reasonably estimates to be necessary to provide replacement Biodiversity Unit(s) on the Council's land of an equivalent number, type and level of enhancement to those lost; or, if the Council is unable to make such provision;

18.3.2 a sum calculated by the Council as the value of the said Biodiversity Units which have been lost to be used by the Council for funding long-term conservation projects in the Council's administrative area which will deliver biodiversity net gain;

18.3.3 [any other costs including professional fees incurred by the Council as a result and in association with the Default Notice;]

## SECOND SCHEDULE THE COUNCIL'S COVENANTS

The Council hereby covenants with the Owner:

### 1. Inspection of the BNG Works – BNG Works Completion Certificate

1.1. To inspect the BNG Works within thirty (30) Working Days following receipt of the BNG Works Completion Notice and issue the Owner [BNG Site Operator] either:

1.1.1 a BNG Works Completion Certificate; or

1.1.2 A written notice that the relevant BNG Works have not been satisfactorily completed, with such notice to include details of any remedial works which must be carried out and the timeframes within which such work needs to be carried out.

1.2 where the Owner [BNG Site Operator] issues a further BNG Works Completion Notice under paragraph 7 of the First Schedule to re-inspect the BNG Works and follow the steps under paragraph 1.1 until the Council issues the BNG Works Completion Certificate.

### 2. Maintenance and Monitoring

2.1 1. To monitor the implementation and operation of the HMMP by a suitably qualified ecology and environmental management professional by way of periodic physical visits to the BNG Site and/or by remotely surveying and reviewing the BNG Monitoring Reports that will be submitted by the Owner, on the first (1), second (2), fifth (5), tenth (10), twentieth (20) and thirtieth (30) anniversaries (***check instructions whether additional monitoring points need to be added for more complex habitats***) from the BNG Works Completion Date or in accordance with such other timescale and frequency as shall be set out in the HMMP agreed in writing with the Council.

2.1.2 If following receipt of a BNG Monitoring Report or at any other time during the Maintenance Period, it appears to the Council that the HMMP has not been complied with, including but not limited to non-compliance as a result of works undertaken by statutory undertakers, to notify the Owner [BNG Site Operator] to that effect with such notice to specify remedial actions and timeframes within which the Owner [BNG Site Operator] need to remedy any defects.

***[(Delete if no Bond/Deposit is involved) 3. Bond/Deposit***

3.1 Following issue of the BNG Works Completion Certificate, to return to the Owner [BNG Site Operator] [XX%] of the Biodiversity Deposit/Bond that has been paid following paragraph 2 of the First Schedule.

3.2 On the fifth anniversary of the BNG Works Completion Date (Year 5), and subject to the Council being satisfied that the Biodiversity Units have been delivered and maintained in accordance with the HMMP to return to the Owner [BNG Site Operator] any remaining monies of the Biodiversity Bond/Deposit.]

**4. Default Notice/Step-in Rights**

4.1 Without prejudice to the exercise of their statutory rights under this Deed or otherwise, if a Default Event occurs, to notify the Owner [BNG Site Operator] of

- (a) the reasons for alleging non-compliance;
  - (b) the steps it proposes the Owner [BNG Site Operator] should take to remedy any breach or non-compliance, and
  - (c) the reasonable time limits for the Owner [BNG Site Operator] to take these steps;
- ("Default Notice")

4.2 Where it serves a Default Notice (or the Expert determines that the Owner [BNG Site Operator] should take any steps within a specified time limit), it may notify the Owner [BNG Site Operator] of any extension of time specified in the Default Notice or Expert's determination, as it considers appropriate (in its absolute discretion);

4.3 In the event that the Owner [BNG Site Operator] fails to comply with the Default Notice the Council may (using its agents, contractors with and without workman and equipment) at any time after expiry of the said period:

4.3.1 enter the BNG site and [other land in the Owner's control needed to access the BNG Site) exercise the Step-In Rights on the BNG Site and

4.3.2 recover their relevant Step-In Costs from the [Biodiversity Deposit/Bond] or any sum paid by the Owner in accordance with paragraph 18.3 of the First Schedule.

5. The provisions in this paragraph are additional to and are not intended to and do not in any way fetter or prevent the Council from exercising its statutory powers in relation to any breach of the obligations in this Deed or from enforcing the other provisions of this Deed.]

## **5. Revision of the HMMP**

5.1 Not to unreasonably withhold or delay giving its written approval to any revised or replacement HMMP submitted by the Owner [BNG Site Operator] to the Council under the First Schedule of this Deed.

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**APPENDIX 1 – BNG SITE PLAN**

**APPENDIX 2 – Biodiversity Metric dated xxxx**

**APPENDIX 3 - HMMP**

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**IN WITNESS OF WHICH** this document has been executed as a Deed by the respective parties hereto in the appropriate manner and with the intention of such document being delivered on the part of each of them as a Deed on (but not before) the date at the top of this Deed.

**THE COMMON SEAL** of                    )  
**CHESHIRE WEST AND CHESTER**                    )  
**BOROUGH COUNCIL**                    )  
was hereunto affixed in the presence of:                    )

Authorised Signatory

DRAFT