

CHESHIRE WEST AND CHESTER BOROUGH COUNCIL (1)

and

The Owner (2)

and

The Developer (3) (NB Developer joined as a party if they have a legal interest in the Application Site as per Section 106(9) (b) of the Town and Country Planning Act 1990)

and

The Mortgagee (4)

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

Planning Application Reference: xxxxxxxxxxxx



**Cheshire West
and Chester**

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

PARTIES

- (1) **CHESHIRE WEST AND CHESTER BOROUGH COUNCIL** of the Portal, Wellington Road, Ellesmere Port, CH65 0BA (**“the Council”**)
- (2) ____ (company registration number: _) whose registered office is at ____ (**“the Owner”**)
- (3) ____ (company registration number: _) whose registered office is at ____ (**“the Developer”**)
- (4) ____ (company registration number: _) whose registered office is at ____ (**“the Mortgagee”**)

INTRODUCTION

- A** The Council is the local planning authority for the area in which the Application Site is situated.
- B** The [Owner] is the proprietor of the freehold interest in the land registered at HM Land Registry [with absolute title/possessory title] under title number(s) ____ which comprises the Application Site ***[also ensure that you include leasehold titles if applicable]***
- C** The Mortgagee is the chargee of the Application Site under a charge dated XXX (***provide date of the charge***) registered at HM Land Registry in Charges Register of title[s] XXX (***provide numbers of titles***) and consents to the giving by the Owner of the covenants in this Deed and agrees that its interests in the Application Site shall be bound by them.
- D** [The Developer has an option to purchase the Application Site].
- E** The [Developer] has submitted the Application and is proposing to carry out the Development.

- F** The Parties are satisfied that the obligations in this Deed are:
- (a) necessary to make the Development acceptable in planning terms (including where appropriate, obligations necessary to mitigate the adverse impacts of the Development in accordance with the development plan for the area relevant to the Application Site and other material considerations);
 - (b) directly related to the Development; and
 - (c) fairly and reasonably related in scale and kind to the Development, and in any event will secure other planning benefits.
- G** The Council has resolved to grant the Planning Permission subject to the prior completion of this Deed without which the Planning Permission would not be granted.
- H** 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 and their successors in title and assigns to the Application Site in the event that the Planning Permission is granted. The Cheshire West and Chester Local Plan (Part Two) 2019 Land Allocations and Detailed Policies ("the Local Plan Part Two") was formally adopted by the Council on 18th July 2019 and forms part of the statutory development plan for the Borough together with the Cheshire West and Chester Local Plan (Part One) 2015 adopted by the Council on 29th January 2015. This Deed fully acknowledges the requirements of the Local Plan Part One and the Local Plan Part Two. The Council is satisfied that the policy requirements in respect of the Contributions as set out in the Cheshire West and Chester Local Plan (Part One) 2015 and the Cheshire West and Chester Local Plan (Part Two) (2019) are satisfied.
- I** This Deed acknowledges the legislation and national and local policy regarding biodiversity net gain, which requires that net gain should be demonstrated as a consequence of development and that any biodiversity net gain proposals should:

- (a) include a long-term habitat and species management plan; and
- (b) be monitored and maintained for the appropriate period of time to ensure that the biodiversity units meet their target condition.

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);

“Application”

means the application for outline/full planning permission (received by the Council on xxxxx) and allocated reference number xxxxx;

“Application Site”

means the [freehold/leasehold] land at [***Description of the land subject to the planning application***] registered at HM Land Registry with absolute title [as shown edged red on the Plan against which this Deed may be enforced];

“Biodiversity Metric Trading Rules”

means the minimum habitat creation and enhancement requirements to compensate for specific habitat losses, up to the point of no net loss based on the habitat type and distinctiveness of the lost habitat;

“Biodiversity Net Gain Contribution”

means the sum of £xxxxxxxxxxx (xxxxxxxxxxxxxxxxxx) Index Linked payable by the Owner to the Council in accordance with paragraph 3 of the First Schedule to be spent within the Ecological Network for the Borough towards a scheme of creation

and/or enhancement and management of the delivery of xxxxxxxx habitat units, or appropriate habitats in line with the relevant Biodiversity Metric Trading Rules, in accordance with the Habitat Management and Monitoring Plan and also land acquisition for this purpose in the Borough;

“Biodiversity Net Gain Metric”

means the calculation used to assess an area’s value to wildlife, developed by Natural England and the Department for Environment, Food and Rural Affairs. The metric uses habitat features to calculate a biodiversity value pre and post development. For the purposes of this Deed the approved biodiversity metric is xxxxxxxx; **[seek instructions from Biodiversity Officer]**

“Biodiversity Reconciliation Calculations”

means a recalculation of the original biodiversity metric submitted with the Application, using the same metric version, to show the progression of biodiversity net gain habitats at reasonable monitoring intervals as determined by the Council;

“Biodiversity Net Gain Review Fee”

means the sum of xxxxxxxxxxxx pounds (£xxxxxxx) payable by the Owner to the Council towards the Council’s costs of monitoring the delivery of biodiversity net gain over the lifetime of the planning obligations;

“Borough”

means the administrative area of Cheshire West and Chester;

“Commencement of Development”

means the carrying out on the Application Site of any material operation (as defined in Section 56(4) of the Act) pursuant to the Planning Permission and “Commence Development” shall be construed accordingly;

“Deed”

means this agreement made under Section 106 of the Town and Country Planning Act 1990 as entered into between the Council and the [Owner/Developer/Mortgagee];

“Department for Environment, Food & Rural Affairs (DEFRA)”

means the public body known as the Department for Environment, Food & Rural Affairs or any successor body which acts as the Government's advisor for the natural environment, food or rural affairs in England;

“Development”

means the development of the Application Site for **(description of development in the planning application e.g. construction of xxxxx dwellings)** as described in the Application;

“Dwelling”

means a dwelling to be constructed on the Application Site pursuant to the Planning Permission (irrespective of any non-compliance with any condition);

“Ecological Network”

means the Ecological Network for the Borough as described in the Cheshire West and Chester Local Plan Part Two Policy DM44 as identified on the policies map and linking areas of biodiversity importance at a broad landscape scale and mapping the main components, including, core areas, corridors and stepping-stones, restoration areas and buffer zones;

“Grassland Habitats”

means a grassland habitat in line with UK habitat classification system and in accordance with the target conditions as detailed in the submitted Biodiversity Net Gain Metric;

“Habitat Management and Monitoring Plan (HMMP)”

means the 30 (thirty) year habitat management and monitoring plan to be produced and implemented by the Council in accordance with paragraph 5 of the Second Schedule;

“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;

“Index Linked”

means increase(d) to reflect any increase in the Index during the period from and including the date of this Deed to and including the date of actual payment;

“Interest”

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

“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;

“Section 106 Monitoring Fee”

means the sum of £xxxxxxx (xxxxxxxxxx pounds) towards the Council’s costs of monitoring the development over the lifetime of the planning obligations;

“Occupation”

means 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 and “Occupied” and “Occupy” shall be construed accordingly;

“Parties”

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

“Plan”

means the plan numbered _ attached to this Deed which shows the extent of the Application Site; **[this should be the red line location plan – NB there may be more than one plan – ownership plan, phasing plan]**

“Planning Permission”

means the Application Site’s planning permission for xxxxxxxxxx **[description of development]** to be granted under application number ____ and any planning permission granted pursuant to an application under section 73 of the Act relating to permission ____ (**“a Subsequent Permission”**) and any planning permission granted pursuant to an application under section 73 relating to a Subsequent Permission;

“Scrub Habitats”

means a scrub habitat in line with UK habitat classification system and in accordance with the target conditions as detailed in the submitted Biodiversity Net Gain Metric;

“Woodland Habitats”

means a woodland habitat in line with UK habitat classification system and in accordance with the target conditions as detailed in the submitted Biodiversity Net Gain Metric;

“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 Application 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 pursuant to 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 pursuant to 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. THE OWNER'S [AND THE DEVELOPER'S] COVENANTS

- 4.1. The Owner [and the Developer] covenants with the Council (so as to bind the Application Site):
- 4.1.1 to fully observe and perform the obligations in this Deed as set out in the First Schedule and hereby agree that Application Site shall be subject to the obligations, restrictions and covenants herein; and
- 4.1.2 not to encumber or otherwise deal with its interest in the Application Site or any part or parts thereof in any manner whatsoever whereby the obligations, covenants and undertakings imposed by this Deed are rendered impossible to carry out.

5. [MORTGAGEE]

- 5.1. The Mortgagee consents to this Deed being entered into with the intention that their interests in the Application 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.

- 5.2. Notwithstanding clause 5.1, the Mortgagee (or any other mortgagee or chargee with a charge over the Application 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 Application Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner].

6. COUNCIL'S COVENANTS

- 6.1. The Council covenants with [the Owner and the Developer] as set out in the Second Schedule.

7. EXCLUSIONS

- 7.1. This Deed does not apply in any way to:

- 7.1.1. any person who ceases to have an interest in the Application Site but without prejudice to liability for any subsisting breach arising prior to cessation;
- 7.1.2. any person whose interest in the Application Site is solely for the purpose of drainage or sewerage or the supply of electricity, gas, water or telecommunications;
- 7.1.3. owners-occupiers of individual Dwellings constructed;
- 7.1.4. any mortgagee or chargee with a charge over the Application Site unless and until it becomes a mortgagee or chargee in possession of the Application Site. **[Delete if mortgagee a party]**

8. DETERMINATION OF DEED

8.1. The obligations in this Deed (with the exception of clause 18.1) shall cease to have effect if, before the Commencement of Development, the Planning Permission:

- (a) has expired within the meaning of Sections 91, 92 or 93 of the Act;
- (b) is varied or revoked or otherwise withdrawn by a statutory procedure without the consent of the Owner; or
- (c) is quashed following a successful legal challenge.

9. INDEXATION

9.1. Any sum referred to in the First Schedule 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.

10. INTEREST

10.1. If any payment due under this Deed is paid late, Interest will be payable by the [Owner/Developer] from the date payment is due to the date of payment.

11. VAT

11.1. All consideration given in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable.

12. NOTICES

12.1. 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 in the manner and marked

for the attention of the person from time to time designated by it to the other parties to this Deed. The initial details so designated are as follows:

12.1.1. The Council: Head of Planning and Place Making, Council Offices,
The Portal, Wellington Road, Ellesmere Port, CH65 0BA

[or

section106@cheshirewestand

chester.gov.uk quoting reference xxxxxxxxx or the reference of any
Subsequent Permission]

12.1.2. The Owner: xxxxxxxxxxxxxxxxxxxxxxxxx

12.1.3. The Developer: xxxxxxxxxxxxxxxxxxxxx

12.1.4. [The Mortgagee: xxxxxxxxxxxxxxxxxxxxxxxxx]

12.2. Subject to clause 12.3 below and unless the date and/or time of actual receipt is proved a notice, demand or other communication sent by the following means is to be treated as having been served as follows:

12.2.1. If delivered by hand at the time of delivery;

12.2.2. If sent by pre-paid first class post on the second Working Day after posting;

12.2.3. If sent by recorded delivery at the date and time delivery was signed for.

12.3. If a notice, demand or other communication is served after 4.00pm 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.

13. JURISDICTION

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

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 Application 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 Application Site or unit of occupation purchased by reference to a plan.

15. LOCAL LAND CHARGES

- 15.1. This Deed shall be registered in the Council's register of local land charges on completion thereof.
- 15.2. Following the performance and satisfaction of all the obligations contained in this Deed the Council shall upon written request of the Owner 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. CONDITIONALITY

- 16.1. This Deed shall come into full force and effect on completion of this Deed save for the First Schedule which shall take effect upon [the grant of Planning Permission/ Commencement of Development – **subject to client's instructions**].

17. WAIVER AND FETTER

- 17.1. 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 for acting upon any subsequent breach or default.
- 17.2. 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 Application Site or otherwise.
- 17.3. In the event that any condition or conditions attached to the Planning Permission are varied pursuant to Section 96A of the Act this Deed shall continue in full force and effect and the planning obligations in this Deed shall relate to and bind any amendment in respect of the Planning Permission with the relevant condition or conditions so varied.
- 17.4. In the event that an application is submitted pursuant to Section 73 of the Act for an amendment to the Planning Permission or a Subsequent Permission and planning permission is granted in respect of that application references to the Planning Permission in this Deed shall also be to the new planning permission(s) granted pursuant to Section 73 of the Act and this Deed shall apply to and remain in full force in respect of any such new planning permission(s) without the need for a further deed pursuant to Section 106/and or Section 106A of the Act **SAVE THAT** nothing in this clause shall fetter the absolute discretion of the Council in determining any future application(s) under Section 73 of the Act to require that a new deed or supplemental deed be entered into pursuant to Section 106 and/or Section 106A of the Act if it considers this necessary.

18. MISCELLANEOUS

- 18.1. The Owner [and/or the Developer] shall pay to the Council on completion of this Deed the reasonable costs of the Council incurred in the negotiation, preparation and execution of this Deed, the Section 106 Monitoring Fee and the Biodiversity Net Gain Review Fee.
- 18.2. Save as provided in respect of successors in title to the Application Site or any successor to the relevant statutory function of the Council no provisions of this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999.
- 18.3. Where the agreement, approval, consent or expression of satisfaction is required by the Owner from the Council under the terms of this Deed such agreement, approval or consent or expression of satisfaction shall be given in writing and on behalf of the Council by the Head of Planning and Place Making.
- 18.4. 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.
- 18.5. The Owner warrants that there are no interests (legal or equitable) required for the purposes of section 106 of the Act in the Application Site.

FIRST SCHEDULE
THE OWNERS' COVENANTS WITH THE COUNCIL

Part 1

General – notifications

1. The Owner covenants with the Council:
 - 1.1. to provide the Council with at least fourteen (14) Working Days' prior written notice of the occurrence of the following:
 - 1.1.1. Commencement of Development;
 - 1.1.2. Occupation of the Development;
 - 1.2. not to Commence Development without having served written notice on the Council of the proposed date of Commencement of Development and First Occupation of the Development fourteen (14) Working Days before the actual date of Commencement of Development.

Part 2

Biodiversity Net Gain

2. To pay to the Council the Biodiversity Net Gain Contribution prior to the [Commencement of Development] and not to [Commence any part of the Development] unless and until the Biodiversity Net Gain Contribution has been paid in full to the Council. **[NB Always check with instructing officer as to trigger point for payment as it could vary e.g. payable on completion of this Deed]**

SECOND SCHEDULE

COUNCIL'S COVENANTS

1. Subject to a written request by the Owner being served on the Council within the last 3 (three) months of the expiry of 31 (thirty one) years from the date of receipt of the Biodiversity Net Gain Contribution, to repay to the Owner any part of that Biodiversity Net Gain Contribution which remains unspent (and for the purposes of this paragraph only, the term "Owner" shall not include successors in title) as long as such part of the Biodiversity Net Gain Contribution no longer serves a planning purpose NOTING THAT if no written request is made within the 3 (three) month period the Council shall be entitled to spend the remaining unspent part of the Biodiversity Net Gain Contribution as it sees fit.
2. To assist with the expenditure of the Biodiversity Net Gain Contribution the Council will at reasonable intervals produce the HMMP which shall include but not be limited to the following:
 - (a) aims, objectives and targets for the habitat creation and/or management, including habitat target conditions;
 - (b) description of the management operations necessary to achieving the aims and objectives;
 - (c) preparation of a works schedule, including timescales for habitat clearance and habitat creation and/or enhancement;
 - (d) details of the monitoring needed to measure the effectiveness of management,
 - (e) mechanisms of adaptive management to account for necessary changes in work schedule to achieve the required targets;
 - (f) reporting at reasonable intervals with Biodiversity Reconciliation Calculations carried out at each interval, using the relevant Biodiversity Net Gain Metric.

- (g) Details of expenditure or commitment of spend to be provided at reasonable intervals as determined by the Council.

DRAFT

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.

Executed as a Deed by)
XXXXXXXX)
in the presence of:)

Witness signature

Witness name

Witness address

Executed as a Deed by)
xxxxxxxxxx)
)
in the presence of:)

Witness signature

Witness name

Witness address

Executed as a Deed by affixing The
Common seal of **CESHIRE WEST AND
CHESTER BOROUGH COUNCIL**

in the presence of:

.....

Authorised Signatory

DRAFT