

# Unilateral Undertaking Pursuant to Section 106 Town and Country Planning Act 1990 and Other Powers

relating to the land known as [\*\* ]

[**Purpose:** securing financial contribution for on-site BNG monitoring, where BNG is secured by condition]

## **Dated**

[\*\* ]  
(the Owner)

[\*\* ]  
the Mortgagee)

## **To**

[\*\* ]  
the Council)

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**Schedule 1 - Plan 1**

**Given By**

- (1) [\*\* ] of [\*\* ] (the **Owner**); and
- (2) [\*\* ] (company registration number [\*\* ]) whose registered office is situated at [\*] (the **Developer**); [
- (3) [\*\* ] (company registration number [\*\* ]) whose registered office is situated at [\*\* ] (the **Mortgagee**).

**Mortgagee Drafting Note:** If including a Mortgagee, include this text.

To

(4) MAIDSTONE BOROUGH COUNCIL of Maidstone House King Street Maidstone Kent ME15 6JQ (the "Borough Council") and

## Recitals

- A The Council is the Local Planning Authority for the purposes of the 1990 Act for the area in which the Development is situated;
- B The Owner is registered as the freehold owner of the Site at the Land Registry under Title Number [\*\* ]; and
- C [The Mortgagee is the beneficiary of a charge dated [\*\* ] in respect of the [freehold/ leasehold] title registered at the Land Registry under title number [\*\*];]

**Mortgagee Drafting Note:** If including a Mortgagee, include recital C.

## 1. Definitions and Interpretation

- 1.1 For the purposes of this Deed the following expressions shall have the following meanings unless the context requires otherwise:

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

**Biodiversity Gain Plan** means the plan submitted to, and approved by the Council, to satisfy the development's biodiversity net gain requirements pursuant to Schedule 7A of the 1990 Act.

**Biodiversity Gain Land Monitoring Contribution** means the sum of £[\*\*] (*[number to be written out ]*) Index Linked to be paid by the Owner to the Council under 0 of this Deed to be applied by the Council as a financial contribution towards the Council's costs of monitoring compliance with [as required by condition [\*\*] of the Planning Permission] and approved by the Council.

**Drafting Note:** Review the proposed conditions and amend this definition as needed so it reflects what the monitoring contribution will fund.

**Commencement Date** means the date upon which the Habitat Creation and Enhancement Works have commenced.

**Deed:** this deed.

[**Default Interest Rate:** [\*\* ] % per annum above the basic lending rate of the Council's bank.]

**Drafting Note:** This definition should reflect the Council's general approach to default interest.

**Development:** the development of the Site authorised by the Planning Permission to [\*\*].

**Habitat Creation and Enhancement Works** means the habitat creation and enhancement works set out in the Habitat Management and Monitoring Plan

(excluding any management or monitoring activities specified in the Habitat Management and Monitoring Plan).

**[Habitat Management and Monitoring Plan or HMMP]** means the document titled 'Habitat Management and Monitoring Plan' as required by condition [\*\*] of the Planning Permission and approved by the Council.

**Drafting Note:** The condition may specify another plan instead of the HMMP. Review the draft conditions to ensure they are consistent. A Habitat Management and Monitoring Plan, or its equivalent may not be

**Plan 1** means the site location plan with drawing number [\*\*] appended to this Deed at Schedule 1.

**Planning Permission:** the planning permission granted in respect of a planning application submitted with reference [\*\*].

**Site** means the land edged [red] on Plan 1.

- 1.2 Clause headings shall not affect the interpretation of this Deed.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.5 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.6 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 1.7 A reference to any party shall include that party's personal representatives, successors and permitted assigns and in the case of the Council the successors to its respective statutory functions.
- 1.8 Unless the context otherwise requires, a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 1.9 Unless the context otherwise requires, a reference to a statute or statutory provision shall include any subordinate legislation made from time to time under that statute or statutory provision.
- 1.10 A reference to **writing** or **written** excludes faxes and e-mail.
- 1.11 A reference to **this Deed** or to any other deed or document referred to in this Deed is a reference to this Deed or such other deed or document as varied or novated (in each case, other than in breach of the provisions of this deed) from time to time.
- 1.12 References to Clauses and Schedules are to the Clauses and Schedules of this Deed.
- 1.13 An obligation on a party not to do something includes an obligation not to allow

that thing to be done.

- 1.14 Any words following the terms **including, include, in particular, for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- 1.15 Where an obligation falls to be performed by more than one person, the obligation can be enforced against every person so bound jointly and against each of them individually.
- 1.16 This deed shall not be enforceable against statutory undertakers or tenants of individual commercial units.

## **2. Legal Basis**

- 2.1 This Deed is made under Section 106 of the Act, Section 111 of the Local Government Act 1972 and Section 1 of the Localism Act 2011 with intent that it creates planning obligations binding the Owner's interest in the Site.
- 2.2 No person shall be liable for any breach of any provisions of this Deed after it shall have parted with its entire interest in the Site or the part of the Site in relation to which the breach relates but without prejudice to its liability for any subsisting breach arising prior to parting with such interest and for the purposes of this clause a person parts with an interest in the Site notwithstanding the retention of easements or the benefit of covenants, restrictions or reservations which shall not constitute an interest for the purposes of this clause.

## **3. Conditionality**

- 3.1 Subject to Clauses 3.2 and 3.3, this Deed is effective on the date hereof.
- 3.2 Clause 0 is effective from the date on which the Planning Permission is granted.
- 3.3 This Deed shall cease to have effect (insofar only as it has not already been complied with) or if the Planning Permission it is modified by any statutory procedure or expires before the Development is Commenced or is at any time revoked this Deed shall forthwith determine and cease to have effect but the Council will not be required to repay any monies to the Owner (to the extent that any such sums have been paid by them) which have been received and expended (or committed to be expended).

## **4. The Owner's Covenants**

- 4.1 The Owner covenants with the Council to pay the Biodiversity Gain Land Monitoring Contribution to the Council:
  - (a) within 10 Working Days of the [Commencement Date]; and

## **5. Indexation**

- 5.1 All financial contributions payable to the Council shall be Index Linked.
- 5.2 Where reference is made to an index and that index ceases to exist or is replaced or rebased then it shall include reference to any index which replaces it or any rebased index (applied in a fair and reasonable manner to the periods before and after rebasing under this Deed) or in the event the index is not replaced, to an

alternative reasonably comparable basis or index as the Council shall advise the Owner in writing.

## **6. Interest on late payment**

- 6.1 If any sum or amount has not been paid to the Council by the date it is due, the Owner shall pay the Council interest on that amount at the Default Interest Rate. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.

## **7. Ownership**

- 7.1 The Owner covenants to give the 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.

## **8. Miscellaneous**

- 8.1 The Owner shall pay to the Council the Council's legal and administrative costs and disbursements incurred in connection with the negotiation preparation execution completion and registration (as a local land charge) of this Deed prior to the date of this Deed.
- 8.2 Where any payment of costs or other payments are to be made by the Owner to the Council such costs and other payments shall be deemed to be reasonable and proper.
- 8.3 This Deed shall be deemed a Local Land Charge and will be registered as such by the Council.
- 8.4 The Parties do not intend any person to have the benefit of the Contract (Rights of Third Parties) Act 1999.
- 8.5 If any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable, such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provision of this Deed.
- 8.6 Nothing contained or implied in this Deed shall prejudice or affect the rights, powers, duties and obligations of the Council in the exercise of its functions in any capacity (including in particular its capacities as highway authority and local planning authority) and the rights, powers, duties and obligations of the Council under private, public or subordinate legislation may be effectively exercised as if it were not a Party to this Deed.

## **9. Section 73 and/or Section 73A Applications**

- 9.1 In the event that the Borough Council (or the Secretary of State on appeal) grants a planning permission pursuant to an application made under section 73 and/or section 73A of the 1990 Act in respect of any condition of the Planning Permission (or a subsequent permission to which this clause relates)

references in this Deed to the Application the Planning Permission and/or the Development shall be deemed to include any such subsequent planning application and planning permission granted pursuant to such application and/or development permitted by such planning permission respectively and this Deed shall take effect and be read and construed accordingly UNLESS the Borough Council in determining the section 73 and/or section 73A application (or the Secretary of State determining the section 78 of the 1990 Act appeal in relation to that application) requires consequential amendments to this Deed as are necessary to make the development the subject of the section 73 and/or section 73A application acceptable in planning terms IN WHICH CASE a separate deed under section 106 or section 106A of the 1990 Act (as the case may be) will be required to secure such planning obligations or other planning benefits as may be determined PROVIDED ALWAYS THAT nothing in this Deed shall in any way fetter the Borough Council's in relation to the section 73 and/or section 73A application or the determination thereof

## **10. Waiver**

10.1 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.

## **11. Agreements and declarations**

11.1 The parties agree that:

- (a) nothing in this Deed constitutes a planning permission or an obligation to grant planning permission; and
- (b) nothing in this Deed grants planning permission or any other approval, consent or permission required from the Council in the exercise of any other statutory function.

## **12 [Mortgagee**

12.1 The Mortgagee consents to the Owner entering into this Deed.

12.2 Subject to Clause 11.3, the Mortgagee acknowledges that the [part of the] Site over which the Mortgagee has a charge shall be bound by the planning obligations in this Deed.

12.3 The Mortgagee (and any other future mortgagee or chargee of any part of the Site) shall have no liability under this Deed unless it takes possession of the Site in which case it shall be bound by the obligations in Clause 0 as a person deriving title through the Owner.]

**Drafting Note:** If there is no Mortgagee as a party, this clause can be deleted.

## **13 Value added tax**

13.1 Each amount stated to be payable by the Council or the Owner to the other under or pursuant to this Deed is exclusive of VAT (if any).



13.2 If any VAT is at any time chargeable on any supply made by the Council or the Owner under or pursuant to this Deed, the party making the payment shall pay the other an amount equal to that VAT as additional consideration on receipt of a valid VAT invoice.

#### **14 Governing law**

14.1 This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

**Drafting Note:** Insert the attestation clauses for the parties.

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

**Signed** as a deed by [\*\*] in the  
presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name (IN BLOCK CAPITALS)  
Address

**EXECUTED** as a deed by

in the presence of:

Director:

Director/Secretary: \_\_\_\_\_



**Schedule 1 - Plan 1**