



## NORTH DEVON COUNCIL

**REPORT TO: STRATEGY & RESOURCES**

Date: 3<sup>rd</sup> February 2020

**TOPIC: MEMORANDUM OF UNDERSTANDING WITH NORTH DEVON HOMES**

**REPORT BY: HEAD OF RESOURCES**

### 1 INTRODUCTION

- 1.1 Estates Officers have identified an opportunity for the Council to invest in its own asset to create added value. It's an opportunity to 'Work' an existing asset to generate beneficial use and best value. This project is self-financing.
- 1.2 NDC currently owns the freehold of the land. These assets were identified as surplus and added to Phase II of Estates proposed disposal of surplus assets.
- 1.3 A report was presented to Executive on 5<sup>th</sup> June 2017, advising Members of the assets and Estate preferred option to dispose. It was agreed that Jon Triggs the Head of Resources was given delegated power to dispose of the listed assets through whichever method he deems appropriate bearing in mind the need to 'obtain best value'.
- 1.4 In a report to Leadership on 23<sup>rd</sup> July 2018 the Estate officers advised they had re-evaluated the surplus assets led by recent changes in the Council's requirements to deliver short and long term Temporary Accommodation (TA) for homeless households, in accordance with its responsibilities under the Housing Act 1996 and Children Act 2004, where the Council must establish a suitable stock of its own accommodations. The initial desk top exercise included reviewing surplus assets against the costs of purchasing land and to support our case to land bank and "hold off" disposal in order to maximise the potential from our own assets. The second task reviewing potential joint partnerships with North Devon Homes (NDHs) for us to develop/secure the Councils long term objectives for TA.
- 1.5 Estates recommended a number of sites to be removed from the surplus assets as pending projects or to be held within our land bank, to assess the potential enhancement in value and use of these assets.
- 1.6 Estates rationale for submitting this report is to demonstrate we are being transparent and clear with our proposed partnerships to gain best value for these surplus assets and to provide Members with an update.

## **2 RECOMMENDATIONS**

- 2.1 Members to note the contents of this report and attached appendix A outlining the Memorandum of Understanding and note that individual development schemes will be subject to further reports being presented to members.
- 2.2 Delegated power be given to the Head of Resources to agree the Memorandum of Understanding with North Devon Homes. This non-binding Memorandum of Understanding (MoU) to sit over the arrangement to set out the principles that govern how both parties will work together as a Joint Venture.

## **3 REASONS FOR RECOMMENDATIONS**

- 3.1 To achieve Members' support of our process and next steps with the Joint Venture
- 3.2 This supports our long term option to enhance value for the benefit for Temporary Accommodation (TA), if the TA requirements are within this locality. Our intention is to keep hold of the land interest and look to gaining an enhanced capital receipt or retain dwellings for the sole purpose of holding onto the freehold for TA.
- 3.3 Estates believe Joint Venture is the best route and that NDC would not achieve best value by selling the site in situ with Clawback clause
- 3.4 Our key aim is to achieve approval for Memorandum of Understanding, as the first stage. The second stage each plot can be delivered separately from one another (schedule 1 known as Scheme Approvals of appendix A) and before entering into Scheme Approvals via a development agreement this will need to be agreed by Strategy and Resources.
- 3.5 North Devon Homes (NDH) board have already agreed to enter into this Memorandum of Understanding and go back to them on Scheme Approvals.

## **4 REPORT**

- 4.1 Background & Context
- 4.2 Officers looked into identified opportunities within their existing portfolio which could support the Councils short term demand for TA.
- 4.3 Our other aim was to establish whether any long term projects/investment would deliver the Councils future requirements for TA. When exploring the long term options our first approach was to review our Surplus Assets.
- 4.4 From reviewing our Surplus Assets it was identified that North Devon Homes (NDH) has a number of site which adjoined ours creating a common interest. Enabling both parties to look at creating a potential Joint Venture.
- 4.5 The Agreed Scheme shows the location of the potential sites. In all of these cases it is our intention to keep hold of the land interest and look to gaining a better capital receipt or retain dwellings for either TA or open market disposal.
- 4.6 As set out in the MoU, the obligations on NDH will be take on the initial steps to facilitate the redevelopment, including the initial risk and costs; such as carrying out all relevant investigations into the likelihood of obtaining planning. To date on all potential site NDH have already submitted pre-planning applications and feedback has been positive.

- 4.7 The intention of the MoU is that NDC and NDH will work together to identify suitable land in the ownership of NDC and to work together to redevelop the land.
- 4.7.1 We are intending that the Memorandum of Understanding will be a working document with quarterly meetings to review the potential sites
- 4.8 The Joint Venture with NDH will be completely self-financing.
- 4.9 NDH are taking on the initial risk and costs to achieve planning and using their expertise to fully investigate the potential for both interested parties to maximise value without implications to NDC's resources. Once build costs are worked out and dwellings sold then there will be net capital receipt to NDC with an element of profit which would not be realised if the site is sold without obtaining detailed planning consent and investing in predevelopment costs
- 4.10 Under the MoU each Agreed Scheme will be reviewed and can be added to in accordance with MoU.
- 4.11 Once planning is received on the individual Agreed Schemes, then this is a trigger to enter into a development agreement subject to each party obtaining appropriate approval, in our case approval from Strategy and Resources. This binding development agreement (joint partnership agreement between NDH and NDC in summary will cover and a standard document is attached to the MoU under Schedule 2) to cover:
- Stating how NDH and NDC will work together
  - Profit split to be shared bespoke to each project
  - Any risks and how both parties will govern the partnership and covering internal governance
  - Ensuring compliance with public law requirements such as procurement, state aid and vires governance
  - Standard of workmanship and design
  - Conditions of completion
  - Rights and consequence to changes of instructions
- 4.12 The final stage both parties to enter into a construction contract with the developer to build the proposed project. Attached to MoU is the standard form schedule 1

## **5 OTHER POINTS TO CONSIDER**

- 5.1 Ensuring this is delivering best value for money for our asset. By enabling a joint venture instead of selling the land with a clawback option will realise the value and the Council will have control.
- 5.2 Risk of not able to sell dwellings on the open market which could affect our land value. Cost of building could affect the value of the land, however the viability element is analysed as part of the second phrase when Officers seek approval to enter into development agreement.
- 5.3 Risk of market conditions
- 5.4 Any concerns on the project during the joint venture, must be documented and advice provided via the working document

5.5 Legal have already been involved with drafting the MoU

## 6 RESOURCE IMPLICATIONS

- 6.1 Completely self-financing with NDHs taking on risk upfront with costs and financing the build, if any unforeseen costs are identified then this will be picked up in the viability study
- 6.2 Legal have already been involved with the drafting of the MoU and looking into our position from a procurement perspective, state aid, vires and governance. Additional support will be required once we reach the development agreement. Additional advice has been sought from external Solicitors.
- 6.3 Estate on producing development appraisals to show the viability of each individual projects and involvement in the development phrase, as our land will not be sold until the dwellings have been built.
- 6.4 Estates and Legal governance of Joint Ventures Partners, will need to ensure correct governance is in place such as preparation and approval of business plans/ case.
- 6.5 No VAT implications, as the Council are not looking to incur any costs upfront and will be receiving a net receipt at the end of the project. However we may have to seek tax advice on these structures.

## 7 EQUALITIES ASSESSMENT

7.1 To follow

## 8 CONSTITUTIONAL CONTEXT

Article or Appendix and paragraph	Referred or delegated power?	Key decision?
Part 3, Annexe 1 Paragraph 1(d)	Delegated	NO

## 9 STATEMENT OF CONFIDENTIALITY

9.1 This report contains no confidential information or exempt information under the provisions of Schedule 12A of 1972 Act

## 10 BACKGROUND PAPERS

10.1 The following background papers were used in the preparation of this report:

- o Advice from Anthony Collins Solicitors on Joint Ventures on state aid, vires and governance – called JV report

The background papers are available for inspection and kept by the author of the report.

## 11 STATEMENT OF INTERNAL ADVICE

11.1 The author (below) confirms that advice has been taken from all appropriate Councillors and officers.

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Author: Naomi Wild

Date 3<sup>rd</sup> Feb 2020

**Dated**

**2019**

**NORTH DEVON DISTRICT COUNCIL**  
and  
**NORTH DEVON HOMES LIMITED**

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**Memorandum of Understanding**

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Legal Services Unit  
North Devon District Council  
PO Box 379  
Barnstaple  
EX32 2GR

## BACKGROUND

- (A) North Devon District Council (**Council**) and North Devon Homes Limited (**NDH**) are proposing to work together for the purposes of developing individual schemes of land identified by the Council as being surplus sites due to their small or inaccessible nature and in which the parties agree to work together due to NDH having an interest in such surplus sites as a result of the potential ability to increase the development potential of NDH's neighbouring or nearby sites (leading to increased marriage value for these surplus sites) or otherwise (**Joint Venture**).
- (B) This memorandum of understanding (**MoU**) sets out the proposed terms of the Joint Venture and provides for the mechanism and trigger points pursuant to which agreed terms shall be entered into by the parties where an individual scheme comes to fruition. It is not intended to be legally binding.

### 1. **Partnership**

The parties wish to work together to deliver the Joint Venture.

### 2. **Structure**

It is proposed that the Joint Venture will be conducted on an informal basis pursuant to this MoU.

### 3. **Project**

3.1 Pursuant to the Joint Venture either party may propose a scheme for consideration by both parties jointly and the parties shall meet [quarterly] (**Quarterly Meetings**) to discuss and approve or reject such schemes, rejection of a scheme by either party shall lead to the withdrawal of that scheme from the Joint Venture.

3.2 Where, pursuant to clause 3.1, a scheme is approved by both parties (**Agreed Scheme**) then the parties agree that:

3.2.1 NDH shall proceed to take all reasonably necessary actions to obtain planning approval to deliver each respective Agreed Scheme; and

- 3.2.2 the Council shall collaborate, co-operate and act in a timely manner to provide all information and reasonable assistance required by NDH to deliver planning approval for each Agreed Scheme.
- 3.3 A list of Agreed Schemes as at the date of this MoU is attached as Schedule 1. Such a list may be reviewed and added to in accordance with this MoU.
- 3.4 In accordance with clause 10 below and for the avoidance of doubt, the actions taken by NDH in pursuance of clause 3.2.1 above shall be taken at NDH's sole risk.
- 3.5 In addition to discussing proposed new schemes at Quarterly Meetings the parties shall also:
  - 3.5.1 review progress on Agreed Schemes; and
  - 3.5.2 review and monitor actions pursuant to any contracts entered into pursuant to an Agreed Scheme.
- 4. **Trigger to enter into a Development Agreement**
- 4.1 Where:
  - 4.1.1 NDH obtains a reasonably acceptable planning approval to deliver an Agreed Scheme (**Planning Approval**); and
  - 4.1.2 each of the parties confirm to one another in writing that they have obtained appropriate committee or board or other appropriate delegated approval to proceed;then clause 4.2 shall apply.
- 4.2 The parties shall enter into a development agreement for the delivery of the Agreed Scheme in the agreed form as set out in Schedule 2 with such amendments as may be negotiated and approved by the parties to tailor the development agreement to the parties' agreed intentions for such Agreed Scheme.
- 5. **Exclusivity and varying an Agreed Scheme**
- 5.1 Subject to clauses 5.2 below, the parties shall not enter into a binding agreement in respect of any land included in an Agreed Scheme with any third party.

5.2 Up to the point that clause 4.1 is triggered in full either party may at any time:

5.2.1 suggest adding additional land to an Agreed Scheme; and/or

5.2.2 withdraw their support for an Agreed Scheme due to viability reasons;

5.3 The parties agree that pursuant to clauses **Error! Reference source not found.**, any proposed addition or withdrawal of land or support for an Agreed Scheme must first be raised at and follow on from a Quarterly Meeting and, in the case of adding land, must be agreed by the parties.

## 6. **Escalation**

6.1 If either party has any issues, concerns or complaints about the Joint Venture, or any matter in this MoU, that party shall notify the other party and the parties shall then seek to resolve the issue by a process of consultation. If the issue cannot be resolved within a reasonable period of time, the matter shall be escalated to the Chief Executive (or equivalent position) of each party who shall then decide together on the appropriate course of action to take.

6.2 If either party receives any formal inquiry, complaint, claim or threat of action from a third party (including, but not limited to, claims made by a supplier or requests for information made under the Freedom of Information Act 2000 or Environmental Information Regulations 2004) in relation to the Joint Venture then the matter shall be promptly referred back to designated authorised representatives of both parties. No action shall be taken in response to any such inquiry, complaint, claim or action to the extent that such response would adversely affect the Joint Venture, without the prior approval of both authorised representatives.

## 7. **Intellectual Property**

7.1 The parties intend that any intellectual property rights created in the course of the Joint Venture shall vest in the party whose employees created them.

7.2 Where any intellectual property right vests in either party in accordance with the intention set out in clause 7.1 above, that party shall grant an irrevocable

licence to the other party to use that intellectual property for the purposes of the Joint Venture.

### 8. **Term and Termination**

This MoU shall commence on the date of signature by both parties. Either party may terminate this MoU by giving at least three months' notice in writing to the other party at any time. For the avoidance of doubt, termination of this MoU shall not affect any development agreement that has already been entered into by the parties pursuant to this MoU in advance of any termination date.

### 9. **Variation**

No variation of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

### 10. **Charges and Liabilities**

10.1 Except as otherwise provided, the parties shall each bear their own costs and expenses incurred in complying with their obligations under this MoU.

10.2 Both parties shall remain liable for any losses or liabilities incurred due to their own or their employee's actions and neither party intends that the other party shall be liable for any loss it suffers as a result of this MoU.

### 11. **Governing Law and Jurisdiction**

This MoU shall be and construed in accordance with English law and, without affecting the escalation procedure in clause 6, each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales.

Each party hereby confirms its agreement to the terms contained in this memorandum of understanding.

Date:.....

..... Authorised signatory,

duly authorised for and on behalf of NORTH DEVON DISTRICT COUNCIL

Date:.....

..... Director,

duly authorised for and on behalf of NORTH DEVON HOMES LIMITED

## SCHEDULE 1

### Agreed Schemes

Council Owned Plots	Development	NDH's Interest	Profit Share and additional agreed Development Costs
Glebelands, Bishop Nympton	<p>Re- development of disused garages to create 2/3 bungalows</p> <p>Pearce Construction 3rd party developer. Providing development advice and project management.</p>	<p>To pilot and promote new energy efficiency technology in rural areas. To be confirmed subject to grant funding</p> <p>Commercial development of OM sales advice.</p> <p>3 dwellings can be achieved on part NDH and Council land.</p>	To be agreed
Pill Gardens, Braunton (primarily vacant site)	<p>2 x 2 bed flats. Planning response secured. Might need to be reduced to a single bungalow.</p> <div style="border: 1px solid red; padding: 2px;"> <p>Reduced to single dwelling s after consulting with planners.</p> </div>	<p>NDH own the adjacent and surrounding land, with the potential to relocate their tenants and release, add value for the Joint Venture partners respectively</p> <p>Only one leaseholder left therefore there will be a cost of acquisition for us.</p>	To be agreed
Deans Lane, South Molton	<p>Re-development of Council owned land to create 3 x 3 bed semi-detached dwellings, with 1 dwelling retained by the Council pursuant to its temporary accommodation project</p>	<p>NDH owns land within the vicinity and it is proposed that NDH will hold 2 dwellings</p> <p>NDC release site with no encumbrance such as WPD services on site.</p> <p>NDH pre plan, project manage and complete scheme – either retaining 2 units for letting or disposal. When</p>	To be agreed

		completed 1 property is retained by the Council at build cost.	
Merseyside Villa, Witheridge	Re-development of allotments to create 4 semi-detached dwellings  Future possibility of 12 units with joint land resource. 2 bed starter homes, due to location	NDH own the adjacent land and by re-developing the plot their land value will increase. By making use of the Council's land the value of the allotment site can increase. Cost to the Council is that it will ultimately be losing existing housing units on site.	To be agreed

**SCHEDULE 2**  
**Form of contract for Agreed Schemes**

**Dated**

**20[ ]**

**NORTH DEVON DISTRICT COUNCIL**  
and  
**NORTH DEVON HOMES LIMITED**

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**Development Agreement**

[Insert property address]

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**THIS AGREEMENT IS DATED**

**PARTIES**

- (1) NORTH DEVON DISTRICT COUNCIL of Lynton House, Commercial Road, Barnstaple, Devon EX31 1PN (**Council**)
- (2) NORTH DEVON HOMES LIMITED incorporated and registered in England and Wales with company number 03674687 whose registered office is at Westacott Road, Barnstaple, Devon EX32 8TA (**NDH**)

**BACKGROUND**

- (A) The Council owns the Property and, working with NDH pursuant to a Memorandum of Understanding dated [ ] (**MoU**), has obtained Planning Permission for the construction of the Building[s] on the Property.
- (B) The Council has agreed to appoint NDH to procure the carrying out of the Development upon the terms and in return for the payments set out in this agreement.

**1. Interpretation**

The following definitions and rules of interpretation apply in this agreement.

**1.1 Definitions:**

**Agreed Completion Date:** the date [NUMBER] [weeks **OR** months] after the date of this agreement as may be extended in accordance with clause 10.1.

**Approved Documents:** all plans, specifications, drawings, engineering calculations, bills of quantity and other data that may be reasonably required in connection with the Development including (where applicable):

- (a) any variations or amendments that may be agreed by the Council and NDH from time to time in accordance with clause 2.2 or clause 2.4; and
- (b) any minor variations permitted under clause 2.3.

- [Architect:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement architect for the time being by NDH [or the Building Contractor], with the approval of the Council, in relation to this agreement and the Building Contract.]
- Building[s]:** [NUMBER] [DESCRIPTION OF BUILDING(S)] [with a total Internal Area of not less than the Minimum Internal Area] for use as [USE].
- Building Contract:** a building contract for the construction of the Building[s] on the Property [and ancillary works] based upon the [JCT Standard Form of Building Contract [EDITION] **OR** [SPECIFY OTHER CONTRACT]] with such amendments as may be approved by the Council.
- Building Contractor:** [NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS], or such other reputable contractor as may be appointed as a replacement building contractor for the time being by NDH, with the approval of the Council.
- CDM Regulations:** the Construction (Design and Management) Regulations 2015.
- Certificate of Practical Completion:** of the Contract Administrator's certificate or written statement issued in accordance with the Building Contract certifying that the Development is practically complete according to the terms of the Building Contract.
- CIL:** the Community Infrastructure Levy introduced by sections 205-225 of the Planning Act 2008 payable in respect of the Development.

<b>Client:</b>	the client as defined by the CDM Regulations.
<b>Collateral Warranty:</b>	a deed of collateral warranty in the appropriate form set out in Schedule 1 to this agreement with such amendments as may be reasonably approved by the Council.
<b>Construction Phase Plan:</b>	the construction phase plan required by the CDM Regulations.
<b>[Contract Administrator:</b>	[NAME] of [ADDRESS] or such other person as may be appointed as a replacement contract administrator for the time being by NDH, with the reasonable approval of the Council, in relation to this agreement and the Building Contract.]
<b>Costs Period:</b>	the period from and including the date of this agreement and ending on the completion of the sale of the whole of the Property.
<b>Council's Representative:</b>	[NAME] of [ADDRESS] or such other person as may be appointed for the time being by the Council in relation to this agreement.
<b>Defects Liability Period:</b>	the defects liability period or rectification period for the making good of defects, shrinkages or other faults in the Works under the Building Contract.
<b>Design Sub-Contractors:</b>	all sub-contractors of the Building Contractor having a design responsibility in relation to the Works under the Building Contract.
<b>Development:</b>	the construction of the Building[s] on the Property by the carrying out of the Works pursuant to the Planning Permission [such construction forming part of a wider development incorporating the Property].
<b>Development Costs:</b>	the costs [up to a maximum total sum of £[AMOUNT]] reasonably and properly incurred in connection with the Development (by NDH or the Council) in

accordance with this agreement, throughout the Costs Period, including (without limitation):

- (a) the costs of preparing the Approved Documents;
- (b) the costs of seeking to obtain or obtaining any release from a third party of any easement, covenant, right or other interest in or over the Property;
- (c) the costs of seeking to obtain or obtaining the Requisite Consents and the costs of preparing and applying for and obtaining the Planning Permission;
- (d) the costs of seeking to obtain or obtaining any grant from a third party of any easement or other right for the benefit of the Property;
- (e) the costs of negotiating, entering into and complying with any Planning Obligation;
- (f) the costs of CIL;
- (g) the costs of obtaining any order for the stopping up or diverting of any highway, bridleway, footpath or sewer and the costs of implementing the order;
- (h) the costs of carrying out the Works;
- (i) the fees of the Professional Team;
- (j) any finance charges, fees and interest paid on any loan or other sum to finance the Development;
- (k) the costs (if any) of insurance in accordance with clause 9.1;
- (l) any rates, supplements, taxes, levies, duties,

charges or other outgoings;

- (m) the costs of the provision of water, electricity and other utilities during the Development Period;
- (n) the costs of taking any actions or proceedings against the Building Contractor or any member of the Professional Team to enforce performance of their respective obligations;
- (o) the legal and estate agent's fees and disbursements payable upon the sale of the Property; and
- (p) any other costs associated with the Development as agreed pursuant to Schedule 1 of the MoU.

**Development Period:** the period from and including the date of this agreement up to and including the Practical Completion Date.

**Development Profit:** the profit (if any) attributable to the Development calculated using the formula:

A - (B + C) where:

A = the actual price achieved on the sale of the whole of the Property;

B = £[AMOUNT] (being the agreed value of the Property as a whole with the benefit of the Planning Permission as at the date of this agreement); and

C = the agreed Development Costs.

**[Employer's Agent:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement employer's agent for the time being by NDH, with the reasonable approval of the Council, in relation to this agreement and the Building Contract.]

**Health and** the health and safety file required by the CDM

- Safety File:** Regulations.
- [Internal Area:** [the [total] [gross **OR** net] internal area of the Building[s] calculated in accordance with RICS, Code of Measuring Practice, 6th edition and RICS Property Measurement, 2nd edition
- OR**
- [the [total] gross internal area of the Building[s] calculated in accordance with the principles of IPMS 2 – Office **OR** the net internal area of the Building[s] calculated in accordance with the principles of IPMS 3 – Office **OR APPROPRIATE RESIDENTIAL IPMS**] as set out in Part 1 and Part 2 of the RICS Property Measurement, 2nd edition].]
- Longstop Date:** [DATE].
- [M&E Engineer:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement mechanical and electrical engineer for the time being by NDH [or the Building Contractor], with the approval of the Council, in relation to this agreement [and the Building Contract].]
- Market Value:** the estimated amount for which the Property should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion on the basis that it is assessed in accordance with paragraph 4 of VPS 4 of the RICS Valuation – Global Standards 2017.
- Material:** all designs, drawings, models, plans, specifications, design details, photographs, brochures, reports, notes of meetings, CAD materials, calculations, data,

databases, schedules, programmes, bills of quantities, budgets and any other materials provided in connection with the Works and all updates, amendments, additions and revisions to them and any works, designs, or inventions incorporated or referred to in them for any purpose relating to the Works.

- [Minimum Internal Area:** [NUMBER] square [metres **OR** feet] of Internal Area.]
- Permitted Uses:** the design, construction, completion, reconstruction, modification, refurbishment, development, maintenance, facilities management, funding, disposal, letting, fitting-out, advertisement, decommissioning, demolition, reinstatement, extension, building information modelling and repair of the Works.
- Planning Obligation:** a statutory obligation that is necessary for or assists in the carrying out of the Development including (without limitation) an obligation under section 106 of the Town and Country Planning Act 1990, section 38 or 278 of the Highways Act 1980 or section 104 of the Water Industry Act 1991.
- Planning Permission:** the [detailed **OR** outline] planning permission dated [DATE] from the [NAME] Council under reference number [NUMBER].
- Practical Completion Date:** the date stated in the Certificate of Practical Completion.
- Principal Designer:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement for the time being by NDH, with the reasonable approval of the Council, to be the principal designer for the purposes of the

Development and the CDM Regulations.

**Professional Appointment:** the appointment of a member of the Professional Team.

**Professional Team:** [the Architect] [, the Principal Designer] [, the Quantity Surveyor] [, the Contract Administrator] [, the Employer's Agent] [, the Structural Engineer] [, the M&E Engineer] and any other specialist advisors or sub-consultants that may, with the approval of the Council, be appointed for the time being in connection with the design or management of the Development.

**Profit Share:** [PERCENTAGE]% of any Development Profit as agreed for the Property pursuant to Schedule 1 of the MoU.

**Property:** [the freehold property at [ADDRESS] and registered at HM Land Registry with title [absolute] under title number[s] [NUMBER[S]].

**OR**

the freehold property at [ADDRESS] and shown edged red on the plan attached to this agreement and being part of the property registered at HM Land Registry with title [absolute] under title number[s] [NUMBER[S]].

**OR**

the freehold property at [ADDRESS] comprised within a conveyance dated [DATE] between [PARTY] and [PARTY].

**OR**

the freehold property at [ADDRESS] shown edged red on the plan attached to this agreement and being part of the land comprised in a conveyance dated [DATE]

between [PARTY] and [PARTY].]

- [Quantity Surveyor:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement quantity surveyor for the time being by NDH [or Building Contractor], with the approval of the Council, in relation to this agreement [and the Building Contract].]
- Requisite Consents:** [the Reserved Matters,] building regulation approvals, by-law approvals, and any other consents, licences and authorisations required from any competent authority, statutory undertaker or person either for the carrying out of the Development or for its intended use as contemplated by the terms of the Planning Permission.
- [Reserved Matters:** all matters remaining to be approved under the terms of the Planning Permission.]
- Settlement Date:** the date on which payment pursuant to this agreement shall be settled if the sale of the whole of the Property has not been achieved by [NUMBER] [weeks OR days] after the Practical Completion Date.
- [Structural Engineer:** [NAME] of [ADDRESS] or such other person as may be appointed as a replacement structural engineer for the time being by NDH [or the Building Contractor], with the approval of the Council, in relation to this agreement [and the Building Contract].]
- VAT:** value added tax [or any equivalent tax] chargeable in the UK [or elsewhere].
- Working Day:** any day that is not a Saturday, Sunday, a bank holiday or a public holiday in [England **OR** Wales].
- Works:** the works described in the Building Contract and the Approved Documents.

- 1.2 Clause, Schedule and paragraph headings shall not affect the interpretation of this agreement.
- 1.3 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.4 The Schedules form part of this agreement and shall have effect as if set out in full in the body of this agreement. Any reference to this agreement includes the Schedules.
- 1.5 A reference to a **company** shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.6 Unless the context otherwise requires, words in the singular shall include the plural and in the plural shall include the singular.
- 1.7 Unless the context otherwise requires, a reference to one gender shall include a reference to the other genders.
- 1.8 Any reference to the **Council** includes the Council's personal representatives, successors in title, or permitted assigns.
- 1.9 A reference to a statute, statutory provision or subordinate legislation is a reference to it as amended, extended or re-enacted from time to time.
- 1.10 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
- 1.11 A reference to **writing** or **written** includes fax but not e-mail.
- 1.12 A reference to **this agreement** or to any other agreement or document referred to in this agreement is a reference to this agreement or such other agreement or document as varied or novated (in each case, other than in breach of the provisions of this agreement) from time to time.
- 1.13 References to clauses and Schedules are to the clauses and Schedules of this agreement and references to paragraphs are to paragraphs of the relevant Schedule.
- 1.14 Any obligation on a party not to do something includes an obligation not to allow that thing to be done.

- 1.15 Unless this agreement otherwise expressly provides, a reference to the **Property** or the **Development** is to the whole and any part of it.
- 1.16 Any reference to the Council's **consent** or **approval** being required is to a consent or approval in writing which must be obtained before the relevant act is taken or event occurs.
- 1.17 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.

## 2. **Approved Documents**

- 2.1 NDH shall procure that the Approved Documents are prepared and submitted within [ten] Working Days after the date of this agreement to the Council for approval (such approval not to be unreasonably withheld or delayed) and upon the Council's approval the Approved Documents shall be signed by both parties.
- 2.2 NDH shall not, (subject to clause 2.3 and clause 2.4), vary, alter, add or remove anything from the Approved Documents without the Council's consent such consent not to be unreasonably withheld or delayed.
- 2.3 NDH may make minor variations to the Approved Documents without the Council's consent provided that:
  - 2.3.1 the variations are insubstantial and immaterial;
  - 2.3.2 the variations are in accordance with the Planning Permission, the Requisite Consents and any statutory requirements;
  - 2.3.3 any substitute materials used are of an equal or better quality and suitability to those originally specified;
  - 2.3.4 the variations do not incur additional expense or delay the completion of the Works; and
  - 2.3.5 NDH informs the Council of the variations promptly.
- 2.4 The Council may, after consultation with NDH, instruct NDH in writing to vary the Approved Documents and NDH shall use reasonable endeavours to

procure that any such variation is implemented as a variation under the Building Contract. The Council shall pay the value of any such variation as calculated in accordance with the provisions of the Building Contract.

### 3. **Requisite Consents**

3.1 Whenever appropriate, NDH shall apply for and use all reasonable endeavours to obtain the Requisite Consents.

3.2 NDH shall keep the Council informed as to progress in obtaining the Requisite Consents and shall promptly supply copies of any that are obtained.

3.3 NDH shall appeal against the refusal of any Requisite Consent, seek a declaration that a Requisite Consent is being unreasonably withheld or take such other steps in order to carry on with the Development as may be reasonably required by the Council.

3.4 NDH shall negotiate any Planning Obligation with the relevant authority subject to the Council's approval as to its terms. The Council shall, at the request of NDH, enter into any such Planning Obligation.

3.5 If any third party has the benefit of any easement, covenant, right or interest in or over the Property that may:

3.5.1 prevent or hinder the progress of the Development; or

3.5.2 adversely affect the use or enjoyment of the Property as contemplated by the terms of the Planning Permission;

then NDH shall negotiate with the third party for its release. The Council shall enter into any requisite deed or agreement with the relevant third party subject to the Council approving its terms, such approval not to be unreasonably withheld or delayed.

3.6 If it is desirable or necessary to obtain the grant of any easement or right from any third party for the benefit of a Property:

3.6.1 for the carrying out of the Development; or

3.6.2 for the use and enjoyment of the Property as contemplated by the terms of the Planning Permission,

NDH shall negotiate with the third party for its grant. The Council shall enter into any requisite deed or agreement with the relevant third party subject to the Council approving its terms (such approval not to be unreasonably withheld or delayed).

3.7 NDH shall use all reasonable endeavours to obtain any orders for stopping up or diverting any highways, footpaths, bridleways or sewers necessary to permit the Development to be carried out.

#### 4. **Professional Team**

4.1 NDH confirms it has taken (or in the case of a substitute member of the Professional Team shall take) all reasonable steps to be reasonably satisfied that each member of the Professional Team is suitable and competent having regard to its responsibilities in relation to the Development, the Building Contract and the CDM Regulations.

4.2 NDH shall liaise with the Principal Designer to allow the Principal Designer to assist NDH in performing NDH's duties as the Client under the CDM Regulations.

4.3 NDH shall submit details of the proposed terms of the Professional Appointment of each member of the Professional Team to the Council for approval (such approval not to be unreasonably withheld or delayed) and shall supply certified copies of the actual terms of each Professional Appointment to the Council.

4.4 Subject to clause 4.1, clause 4.2 and clause 4.3, NDH shall, once such of the Requisite Consents have been obtained so as to enable the Works to commence, appoint the members of the Professional Team.

4.5 NDH shall, upon the appointment of each member of the Professional Team, procure that the members enter into a Collateral Warranty in favour of the Council.

4.6 NDH shall procure that each member of the Professional Team grants to the Council an irrevocable, non-exclusive, non-terminable, royalty-free licence to copy and make full use of any Material prepared by or on behalf of the relevant member of the Professional Team for any purpose relating to the

Works including (without limitation) any of the Permitted Uses. Such licence shall:

- 4.6.1 carry the right to grant sub-licences and shall be transferable to third parties without the consent of NDH or the relevant member of the Professional Team; and
  - 4.6.2 provide that the relevant member of the Professional Team has no liability for use of the Material for any purpose other than that for which it was prepared and/or provided.
- 4.7 NDH shall procure that the terms of the Professional Appointment of the [Architect OR Contract Administrator OR Employer's Agent] requires it to act impartially when exercising its power to issue certificates and award extensions of time under the Building Contract.
- 4.8 NDH shall use reasonable endeavours to procure that each member of the Professional Team performs and observes the terms of its Professional Appointment. NDH agrees not to vary, waive or release any member of the Professional Team's Professional Appointment without the Council's consent (such consent not to be unreasonably withheld or delayed).
- 4.9 NDH shall not do or omit to do anything that would entitle any member of the Professional Team to regard its employment under its Professional Appointment as terminated. NDH shall immediately notify the Council if NDH believes that any member of the Professional Team may be intending to rescind its Professional Appointment.
- 4.10 NDH shall not terminate the employment of any member of the Professional Team under its Professional Appointment or treat such Professional Appointment as repudiated without first notifying the Council of its intention to do so and discussing with the Council the appointment of a suitable substitute approved by the Council.
5. **Building Contract**
- 5.1 NDH confirms it has taken (and in the case of a substitute Building Contractor shall take), all reasonable steps to be reasonably satisfied that the Building Contractor is suitable and competent having regard to its

responsibilities in relation to the Development, the Building Contract and the CDM Regulations.

- 5.2 NDH shall (subject to clause 5.1), once such of the Requisite Consents have been obtained so as to enable the Works to commence, use reasonable endeavours to enter into the Building Contract with the Building Contractor, appoint the Building Contractor as the principal contractor for the purposes of the CDM Regulations and supply a certified copy of the Building Contract to the Council.
- 5.3 NDH shall, upon the appointment of the Building Contractor and each Design Sub-Contractor, procure that it enters into a Collateral Warranty in favour of the Council.
- 5.4 NDH shall procure that the Building Contractor and each Design Sub-Contractor grants to the Council an irrevocable, non-exclusive, non-terminable, royalty-free licence to copy and make full use of any Material prepared by or on behalf of the Building Contractor or the relevant Design Sub-Contractor for any purpose relating to the Works including (without limitation) any of the Permitted Uses. Such licence shall:
  - 5.4.1 carry the right to grant sub-licences and shall be transferable to third parties without the consent of the Building Contractor or the relevant Design Sub-Contractor; and
  - 5.4.2 provide the Building Contractor or the relevant Design Sub-Contractor has no liability for use of the Material for any purpose other than that for which it was prepared and/or provided.
- 5.5 NDH shall use reasonable endeavours to procure that the Building Contractor performs and observes the terms of the Building Contract. NDH agrees not to vary, waive or release any of the terms of the Building Contract without the Council's consent (such consent not to be unreasonably withheld or delayed).
- 5.6 NDH shall not do or omit to do anything that would entitle the Building Contractor to regard the Building Contract as terminated by breach. NDH shall promptly notify the Council if NDH believes the Building Contractor may be intending to rescind the Building Contract.

5.7 NDH shall not terminate the employment of the Building Contractor or treat the Building Contract as repudiated without first notifying the Council of its intention to do so and discussing with the Council the appointment of a suitable substitute contractor approved by the Council.

### 6. **Development Obligations**

6.1 The Council grants NDH licence for NDH, the Building Contractor, the Building Contractor's sub-contractors and the Professional Team to enter upon the Property solely for the purpose of carrying out their respective obligations in connection with the Development.

6.2 NDH shall use reasonable endeavours to ensure vacant possession is available for the Building Contractor at all times during the Development Period and the Council shall join in any actions or proceedings against trespassers at NDH's reasonable request.

6.3 NDH shall use reasonable endeavours to procure the carrying out of and completion of the Development by the Agreed Completion Date.

6.4 NDH shall procure that the Development is carried out:

6.4.1 diligently, in a good and workmanlike manner and in accordance with good building practice;

6.4.2 using only good quality materials and well-maintained plant;

6.4.3 in accordance with this agreement, the Approved Documents, the Planning Permission and the Requisite Consents;

6.4.4 to the Council's reasonable satisfaction;

6.4.5 in accordance with all statutory or other legal requirements and the recommendations or requirements of the local authority or statutory undertakings;

6.4.6 in accordance with any Planning Obligation;

6.4.7 in compliance with all relevant British Standards, codes of practices and good building practice;

- 6.4.8 by selecting and using materials so as to avoid hazards to the health and safety of any person and to ensure the long term integrity of the Building[s];
  - 6.4.9 in accordance with all covenants, stipulations, rights and conditions affecting the Property; and
  - 6.4.10 so that on the Practical Completion Date the Development shall be fit for its intended purpose as contemplated by the Planning Permission.
- 6.5 NDH shall ensure that during the Development Period:
- 6.5.1 no nuisance, damage or injury is caused to any person or property due to the carrying out of the Works;
  - 6.5.2 any inconvenience or disturbance to adjoining or neighbouring owners, occupiers or members of the public is kept to a reasonable minimum;
  - 6.5.3 the Property is secured at all times so as to prevent unauthorised entry so far as is possible;
  - 6.5.4 no signs or advertisements are displayed on the Property without the Council's consent other than those giving the names and roles of NDH, the Building Contractor and the members of the Professional Team;
  - 6.5.5 the Property is kept tidy and clear of rubbish and no goods or materials are deposited or stored on the Property which are not required within a reasonable time for the carrying out of the Works;
  - 6.5.6 no soil, gravel or other minerals are removed from the Property except to the extent necessary for the carrying out of the Works;
  - 6.5.7 suitable arrangements are made with the relevant authorities for the supply of water, electricity and other utilities to enable the carrying out of the Works;
  - 6.5.8 the Building[s], whilst in the course of construction, are kept in good repair and condition;

- 6.5.9 on the Practical Completion Date, the Property is left in a clean and tidy condition, with all unused materials and plant, equipment and temporary structures having been removed; and
  - 6.5.10 the Council's reasonable instructions for the removal of valuable, historical or other items of interest found on the Property are observed.
- 6.6 NDH shall:
- 6.6.1 employ appropriate staff to provide necessary administrative services in respect of the Development;
  - 6.6.2 coordinate or procure coordination of the Professional Team;
  - 6.6.3 keep the Council's Representative regularly informed as to progress of the Works;
  - 6.6.4 without prejudice to clause 6.3, promptly notify the Council's Representative of any material problems or delays in the performance of the Building Contract together with NDH's recommendations for overcoming and/or mitigating them;
  - 6.6.5 give at least 10 Working Days' notice to the Council's Representative of all meetings to be held in connection with the progress of the Works and permit the Council's Representative to attend and to make representations; and
  - 6.6.6 promptly supply the Council's Representative with a copy of all reports, certificates and any other information reasonably required by the Council's Representative and shall provide access to all correspondence and other written materials relating to the Development.
- 6.7 NDH shall remove, repair or replace any materials or works which in the Council's Representative's reasonable opinion are inadequate or unsuitable for their intended purpose or which are not in accordance with the Approved Documents, within 10 Working Days after receiving notice from the Council's Representative to do so or as soon as reasonably practicable thereafter.

### 7. **The CDM Regulations**

- 7.1 NDH and the Council agree that NDH is to be treated for the purposes of the CDM Regulations as the only Client.
- 7.2 NDH agrees to undertake all the obligations of a Client and to ensure that the Works are carried out in accordance with the CDM Regulations.
- 7.3 Before commencement of the Works, NDH shall notify the Works to the Health and Safety Executive in accordance with the CDM Regulations and shall give the Council a copy of the notification and any acknowledgement from the Health and Safety Executive.
- 7.4 NDH shall use its best endeavours to ensure that the Principal Designer and Building Contractor (as principal contractor and contractor) each comply with their respective obligations under the CDM Regulations.
- 7.5 NDH shall ensure that the Principal Designer and Building Contractor are both promptly:
  - 7.5.1 supplied with all relevant information required under the CDM Regulations; and
  - 7.5.2 notified of any changes relating to the Development which may have any effect on their responsibilities or duties under the CDM Regulations.
- 7.6 NDH shall:
  - 7.6.1 ensure that the Building Contractor prepares the Construction Phase Plan;
  - 7.6.2 not allow the construction phase of the Works to commence until the Construction Phase Plan is prepared;
  - 7.6.3 not allow the construction phase of the Works to commence until the site welfare facilities required by schedule 2 to the CDM Regulations are in place; and
  - 7.6.4 ensure that the Health and Safety File is prepared by the Principal Designer and is maintained correctly and is available for inspection in accordance with the CDM Regulations.

7.7 NDH shall indemnify and keep the Council indemnified against liability for any breach of NDH's obligations under or in connection with this clause 7.

## 8. **Inspection**

8.1 The Council and the Council's Representative may enter the Property, at any time during the Development Period, upon reasonable notice to the Building Contractor, to inspect progress of the Works and the materials used. In entering the Property, the Council and Council's Representative shall not obstruct progress of the Works and shall:

8.1.1 not give any instructions or make any representations directly to the Building Contractor or Professional Team; and

8.1.2 comply with NDH and the Building Contractor's health and safety and site rules.

8.2 NDH shall procure that any instructions or representations made to NDH by the Council or the Council's Representative that comply with the terms of this agreement are promptly dealt with to the Council's reasonable satisfaction.

8.3 NDH shall regularly inspect or procure the inspection of the Development and procure that any defects, shrinkages or other faults in the Building[s] [and ancillary works] that appear during the carrying out of the Works are promptly remedied.

## 9. **Insurance**

9.1 Except where it is agreed that it is likely to be financially better for the Council to hold such insurance, from the date of this Agreement NDH shall insure, or shall procure that the Building Contractor insures, the Works, the Building[s] and all plant and unfixed materials and goods delivered to or placed on or adjacent to the Property and intended for incorporation in the Works against all perils resulting in loss or damage thereto on customary contractor's all risks terms:

9.1.1 in the joint names of the Council, NDH and the Building Contractor; and

9.1.2 for not less than the full reinstatement value thereof (taking into account the progress of the Works) together with all site clearance

and professional fees incurred in connection with such reinstatement.

NDH shall keep the Works, Building[s], plant, materials and goods so insured or procure that they are kept so insured until the Practical Completion Date.

- 9.2 In the event of any loss or damage to the Works, NDH shall procure that their reinstatement or replacement is carried out diligently and with all reasonable speed. NDH shall apply the proceeds of the insurance towards such reinstatement or replacement and shall make good any deficiency out of its own funds.
- 9.3 Without prejudice to the indemnity in clause 14.2, NDH shall maintain, or procure that the Building Contractor maintains, insurance in respect of injury to or death of any person or loss or damage to any real or personal property for an indemnity of not less than £[AMOUNT] for any one occurrence or series of occurrences arising out of the same event. Such insurance shall be maintained from the date of this agreement until the end of the Defects Liability Period.
- 9.4 NDH shall require that [the Building Contractor and] each member of the Professional Team and each Design Sub-Contractor, as a condition of its appointment, maintains professional indemnity insurance cover with a reputable insurer for an amount not less than that stated in Schedule 2. The insurance cover must be maintained for a minimum of 6 years following the Practical Completion Date, provided that such insurance is available at commercially reasonable rates and terms.
- 9.5 The Council may at any time request documentary evidence that the insurance policies required by this clause are being maintained including, if required by the Council, an original letter from NDH's insurers confirming:
  - 9.5.1 the insurance currently in force; and
  - 9.5.2 that premiums for that insurance have been paid in full at the date of that letter.

If NDH fails to provide such evidence within 10 Working Days of the Council's request, then the Council may effect such insurance itself and recover the cost of doing so from NDH.

9.6 NDH and the Council mutually agree not knowingly to do or permit anything to be done that may render any insurance policy void or voidable.

### 10. **Extensions of Time and Liquidated Damages**

10.1 The Agreed Completion Date shall be extended:

10.1.1 commensurate with any extensions of time properly allowed by the [Architect OR Contract Administrator OR Employer's Agent] under the terms of the Building Contract, except where the delay is attributable to the fault of NDH or any member of the Professional Team;

10.1.2 where completion of the Works is delayed due to an event which is beyond the control of NDH except where such event is attributable to the fault of the Building Contractor, the Building Contractor's sub-contractors or any member of the Professional Team; and

10.1.3 in the event that the Council breaches the terms of this agreement or varies the Approved Documents in accordance with clause 2.4 so as to delay the completion of the Works.

In any such event the parties shall procure that the Council's Representative impartially estimates a fair and reasonable extension of time and certifies the extension of time to which NDH is entitled.

10.2 If NDH fails to procure that the Practical Completion Date occurs on or before the Agreed Completion Date, it shall pay the Council liquidated damages at the rate of £[AMOUNT] for every week (or pro rata for part of a week) from the Agreed Completion Date up to and including the Practical Completion Date. The parties confirm that this rate represents a genuine pre-estimate of the Council's loss.

10.3 Provided that the Council gives NDH the appropriate notice under clause 13.7, the Council shall be entitled to deduct any liquidated damages payable

under clause 10.2 from any payments due to NDH under the terms of this agreement.

- 10.4 Any liquidated damages payable under clause 10.2 shall be payable weekly in arrears and shall be due for payment on demand, such demand to take the form of an invoice from the Council to NDH specifying the sum that the Council considers to be due on the payment due date and the basis on which that sum is calculated, accompanied by any relevant supporting documents. The final date for payment of liquidated damages shall be 15 days after the date on which payment becomes due.

### 11. **Practical Completion**

- 11.1 NDH shall procure that:

11.1.1 the [Architect OR Contract Administrator OR Employer's Agent] gives at least 10 Working Days' notice to the Council's Representative of its intention to inspect the Development for the purposes of issuing the Certificate of Practical Completion. The Council's Representative may attend the inspection and make representations to NDH; and

11.1.2 without fettering the discretion of the [Architect OR Contract Administrator OR Employer's Agent] in carrying out its duties under the Building Contract, the [Architect OR Contract Administrator OR Employer's Agent] takes proper consideration of any representations that are made when considering whether to issue the Certificate of Practical Completion in accordance with the terms of the Building Contract.

- 11.2 NDH shall ensure that the [Architect OR Contract Administrator OR Employer's Agent] gives a copy of the Certificate of Practical Completion to the Council promptly after its issue, together with a copy of any accompanying snagging list.

- 11.3 If the Council believes that the [Architect's OR Contract Administrator's OR Employer's Agent's] decision to issue a Certificate of Practical Completion is incorrect or that the certificate ought to have been qualified, the Council may notify NDH within 10 Working Days giving details of the Council's objections.

The Council and NDH shall use their reasonable endeavours to agree what action should be taken, but if they cannot agree then either party may refer the matters they have been unable to agree to arbitration in accordance with clause 19. NDH shall take whatever action, if any, which may be agreed with the Council or is required by the arbitrator.

11.4 NDH shall within two weeks after the Practical Completion Date:

11.4.1 deliver to the Council the Approved Documents, the Requisite Consents, Construction Phase Plan, the Health and Safety File and two sets of as-built drawings;

11.4.2 to the extent that copyright licences have not already been granted in accordance with clause 4.6 or clause 5.4, procure the grant or assignment to the Council of a copyright licence in the same terms as set out in clause 4.6 and clause 5.4 in respect of the designs and documents referred to above in clause 11.4.1; and

11.4.3 take any other steps reasonably required to ensure the Council has the rights to use the documents referred to above in clause 11.4.1 without payment to any person.

## 12. **Defects Liability**

12.1 During the Defects Liability Period NDH shall inspect or procure such inspections of the Works as are reasonably necessary or appropriate to identify any defects, shrinkages or other faults in the Works.

12.2 NDH shall prepare a list of all defects, shrinkages or other faults in the Works (incorporating any defects, shrinkages or other faults in the Works notified to it by the Council's Representative) and give it to the Building Contractor within the time limits specified by the Building Contract.

12.3 NDH shall ensure that the Building Contractor's obligations to remedy defects, shrinkages or other faults in the Works during the Defects Liability Period are enforced and that all such defects, shrinkages or other faults in the Works are remedied promptly in accordance with the Building Contract.

## 13. **Payment**

13.1 Unless otherwise agreed, the Council shall work with NDH and use all reasonable endeavours to complete a sale of the whole of the Property at Market Value before the Settlement Date, taking into account any wider development being carried out by NDH which the Property may form a part, and shall notify NDH in writing within 14 days after exchange of contracts of the sale price for the Property and the actual value of this (the **Achieved Value**).

13.2 Following the sale of the whole of the Property in accordance with clause 13.1, the Council shall:

13.2.1 to the limit of the Achieved Value, pay NDH the Development Costs (which, for the avoidance of doubt, shall include any sums incurred by NDH under the Building Contract). In this regard NDH shall supply the Council with an invoice specifying the sum that NDH considers will become due on the payment due date and the basis on which that sum is calculated, accompanied by copy third party invoices, bills, accounts or other proper documentary evidence, together with such other information as the Council's Representative may reasonably require to verify the amount due. The final date for payment for such Development Costs shall be the date 30 days after the date such Development Costs were due for payment in accordance with this clause 13.2; and

13.2.2 pay NDH its part of the Profit Share (if any) on the date that the Achieved Value is obtained. The Profit Share (if any) shall be due for payment on the date NDH supplies the Council with an invoice specifying the Profit Share that NDH considers will become due and the basis on which that sum is calculated. The final date for payment of the Profit Share (if any) shall be the date 30 days after the date on which payment becomes due.

13.3 NDH agrees that if the Council is or becomes a "contractor" under the HMRC Construction Industry Scheme, the Council shall make any deductions from sums due to NDH pursuant to clause 13.2.1 as required by the HMRC

Construction Industry Scheme. NDH agrees with the Council that it shall comply with the HMRC Construction Industry Scheme.

- 13.4 The Profit Share is exclusive of Value Added Tax, which shall be payable in addition by the Council to NDH and NDH shall promptly supply proper VAT invoices to the Council.
- 13.5 If the whole of the Property has not been sold by the Settlement Date then the Council and NDH shall settle this agreement by either:
- 13.5.1 attempting to agree the Market Value as at the Settlement Date and, for the purposes of this clause 13.5.1 only, this agreed Market Value shall be treated as the “Achieved Value” for the purposes of settling NDH’s Development Costs and paying any prospective Profit Share in accordance with clause 13.2; or
- 13.5.2 (with this option being offered at the Council’s discretion) agreeing the transfer of the whole of the Property to NDH for use as social housing by NDH and the Council and NDH shall enter into an appropriately worded deed of covenant as provided by the Council to restrict disposals of the Property save for use as social housing.
- 13.6 If, in accordance with clause 13.5.1, the Council and NDH fail to agree upon the Market Value within four weeks of the Settlement Date, either party may refer the matter to an arbitrator in accordance with clause 19 for the arbitrator to decide the Market Value.
- 13.7 For any sum due from the Council to NDH:
- 13.7.1 no later than five days after payment becomes due, the Council shall notify NDH of the sum that the Council considers to have been due at the payment due date in respect of the payment and the basis on which that sum was calculated;
- 13.7.2 subject to clause 16.1.2 and unless the Council has served a notice under clause 13.7.3, it shall pay NDH the sum referred to in the Council’s notice under clause 13.7.1 (or, if the Council has not served a notice under clause 13.7.1, the sum referred to in NDH’s

invoice) (in either case in this clause 13.7 the **notified sum**) on or before the final date for payment of each invoice;

13.7.3 not less than seven days before the final date for payment (in this clause 13.7, the **prescribed period**), the Council may give NDH notice that it intends to pay less than the notified sum (in this clause 13.7, a **pay less notice**). Any pay less notice shall specify:

13.7.3.1 the sum that the Council considers to be due on the date the notice is served; and

13.7.3.2 the basis on which that sum is calculated; and

13.7.4 if the Council fails to pay an amount due to NDH by the final date for payment and fails to give a pay less notice under clause 13.7.3, simple interest shall be added to the unpaid amount from the final date for payment until the actual date of payment. This shall be calculated on a daily basis at the annual rate of 5% above the base rate set from time to time by the Bank of England's Monetary Policy Committee or any successor to it. The parties acknowledge that the Council's liability under this clause 13.7.4 is a substantial remedy for the purposes of section 9(1) of the Late Payment of Commercial Debts (Interest) Act 1998.

13.7.5 if the Council and NDH fail to agree the notified sum within four weeks of the final date for payment of each invoice, either party may refer the matter to an arbitrator in accordance with clause 19 for the arbitrator to decide the notified sum.

#### 14. **Warranties and Indemnities**

14.1 NDH warrants and undertakes that:

14.1.1 it has surveyed the Property and is satisfied that the Property is physically suitable for the Development;

14.1.2 on the Practical Completion Date the Development shall have been soundly constructed, free from defects and using materials and workmanship of the standard required by the Approved Documents and clause 6.4.7 and clause 6.4.8;

- 14.1.3 on the Practical Completion Date the Development shall be fit for its intended purpose as contemplated by the Planning Permission; and
  - 14.1.4 it has disclosed all material information related to insurance of the Development pursuant to clause 9 and such information is true and complete in all material respects.
- 14.2 NDH shall indemnify the Council against all liabilities, costs, expenses, claims, damages, losses, demands, actions and proceedings suffered or incurred by the Council arising out of or in connection with any breach or negligent performance or non-performance of NDH's obligations in this agreement including (but not limited to):
- 14.2.1 any claims for death, personal injury or damage to property;
  - 14.2.2 any statutory or other liability for the safety or security of the Property, working methods, employment practices, protection of the environment and control of pollution; and
  - 14.2.3 any claims for unlawful interference with any right of light, air, support, water, drainage or any other easement or right.
15. **Termination**
- 15.1 Without affecting any other right or remedy available to it, the Council may terminate this agreement with immediate effect by giving notice to NDH if any of the following events occur:
- 15.1.1 NDH is in fundamental breach of any of its material obligations in this agreement;
  - 15.1.2 NDH is in substantial breach of any of its obligations in this agreement and has failed to rectify the breach within a reasonable time after being notified in writing to do so; or
  - 15.1.3 NDH suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

- 15.1.4 NDH commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with its creditors other than for the sole purpose of a scheme for a solvent amalgamation of NDH with one or more other companies or the solvent reconstruction of NDH;
- 15.1.5 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of NDH other than for the sole purpose of a scheme for a solvent amalgamation of NDH with one or more other companies or the solvent reconstruction of NDH;
- 15.1.6 an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over NDH;
- 15.1.7 the holder of a qualifying floating charge over the assets of NDH has become entitled to appoint or has appointed an administrative receiver;
- 15.1.8 a person becomes entitled to appoint a receiver over the assets of NDH or a receiver is appointed over the assets of NDH;
- 15.1.9 a creditor or encumbrancer of NDH attaches or takes possession of, or an execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of NDH's assets and such attachment or process is not discharged within 14 Working Days;
- 15.1.10 any event occurs, or proceeding is taken, with respect to NDH in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 15.1.3 to clause 15.1.9 (inclusive);
- 15.1.11 NDH suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business;

15.1.12 NDH is struck off from the Register of Companies; or

15.1.13 NDH otherwise ceases to exist.

15.2 Without affecting any other right or remedy available to it, if the Practical Completion Date has not occurred by the Longstop Date then the Council may terminate this agreement with immediate effect by giving notice to NDH at any time after the Longstop Date, but before the Practical Completion Date has occurred.

### 16. **Consequences of Termination**

16.1 If notice is served by the Council pursuant to clause 15.1 or clause 15.2:

16.1.1 NDH's licence to enter the Property shall immediately end;

16.1.2 the Council shall not be liable to make any further payments to NDH under the terms of this agreement except sums which have fallen due for payment before the date of termination (provided that, notwithstanding clause 13.7, if NDH is subject to any of the events described in clause 15.1.3 to clause 15.1.13 (inclusive) after the prescribed period in clause 13.7.3, the Council shall not be required to pay NDH the notified sum (as defined in clause 13.7.2));

16.1.3 the Council may enforce its rights contained in the Collateral Warranties to substitute itself in NDH's place in relation to the Building Contract and the appointments of the Professional Team; and

16.1.4 NDH shall assign all rights of action it may have against the Building Contractor and the Professional Team to the Council absolutely and NDH hereby irrevocably appoints the Council as its attorney to sign, execute and deliver on its behalf all deeds and documents and to do all acts and things necessary to give effect to such assignment.

### 17. **Alienation**

17.1 NDH may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with its interest in this agreement or any part of it nor agree to do so.

17.2 The Council may not assign, charge or part with its interest in this agreement or the Property except as permitted by clause 17.3.

17.3 The Council may:

17.3.1 sell the Property as a whole prior to the Practical Completion Date subject to the buyer entering into a deed of covenant with NDH containing covenants by the buyer to observe and perform the outstanding obligations on the part of the Council contained in this agreement; or

17.3.2 assign the benefit of this agreement by way of security to any person or body providing finance for the Development (including any reassignment on redemption of security), whether that person acts on its own account, as agent for a syndicate of other parties or otherwise.

## 18. **Actions and Proceedings**

18.1 NDH shall diligently pursue any actions or proceedings reasonably required by the Council against the Building Contractor or a member of the Professional Team in order to enforce the performance of their respective obligations.

18.2 NDH shall hold any sums recovered as a result of such actions or proceedings on trust for the Council and shall apply them in remedying the situation that gave rise to the action or proceedings.

18.3 NDH shall take account of any reasonable requests or proposals made by the Council in relation to the conduct of any such actions or proceedings.

## 19. **Disputes**

Without prejudice to any right which NDH or the Council has to refer a dispute to adjudication under the Housing Grants, Construction and Regeneration Act 1996, if any dispute arises between the Council and NDH arising out of this agreement the dispute shall be referred (in the absence of any express provision to the contrary) to an arbitrator appointed jointly by the Council and NDH. If the parties cannot agree on the arbitrator's identity the arbitrator shall be appointed on either party's request by the President for the

time being of the Chartered Institute of Arbitrators. The arbitrator shall act in accordance with the Arbitration Act 1996 and the costs of the arbitration shall be payable by the parties in the proportions determined by the arbitrator.

**20. Notices**

20.1 Any notice given under this agreement must be in writing.

20.2 Any notice given under this agreement must be:

20.2.1 delivered by hand; or

20.2.2 sent by pre-paid first class post or other next working day delivery service.

20.3 Any notice given under this agreement must be sent to the relevant party as follows:

20.3.1 to the Council at:

Lynton House, Commercial Road, Barnstaple, Devon EX31 1DG

marked for the attention of: Chief Executive;

20.3.2 to NDH at:

North Devon Homes, Westacott Road, Barnstaple, Devon EX32 8TA

marked for the attention of: Chief Executive

or as otherwise specified by the relevant party by notice in writing to the other party.

20.4 Any change of the details in clause 20.3 specified by the relevant party by notice in writing to each other party shall take effect for the party notified of the change at 9.00 am on the later of:

20.4.1 the date, if any, specified in the notice as the effective date for the change; or

20.4.2 the date five Working Days after deemed receipt of the notice.

20.5 Any notice given in accordance with clause 20.1, clause 20.2 and clause 20.3 will be deemed to have been received:

20.5.1 if delivered by hand, on signature of a delivery receipt or at the time the notice or document is left at the address provided that if delivery occurs before 9.00 am on a Working Day, the notice will be deemed to have been received at 9.00 am on that day, and if delivery occurs after 5.00 pm on a Working Day, or on a day which is not a Working Day, the notice will be deemed to have been received at 9.00 am on the next Working Day; or

20.5.2 if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second Working Day after posting; or

20.6 A notice given under this agreement shall not be validly given if sent by email.

20.7 This clause does not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

### 21. **Value Added Tax**

All sums due and payable under this agreement for the supply of goods and services are exclusive of any VAT arising in respect of them and a sum equal to such VAT shall be payable in addition.

### 22. **No Partnership**

Nothing in this agreement is intended to, or shall be deemed to, establish any partnership or joint venture between the Council and NDH.

### 23. **Third Party Rights**

A person who is not a party to this agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

### 24. **Governing Law**

This agreement 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.

25. **Jurisdiction**

Subject to clause 18, each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

**THIS AGREEMENT** has been entered into on the date stated at the beginning of it.

**SCHEDULE 1**

**Collateral warranties**

**PART 1 – Sub-contractor collateral warranty**

Dated

2019

**[SUB-CONTRACTOR]**  
and  
**NORTH DEVON DISTRICT COUNCIL**  
and  
**[BUILDING CONTRACTOR]**

---

**Sub-Contractor's Collateral Warranty**

Relating to a Project at

[ ]

---

**THIS AGREEMENT** is dated

**BETWEEN**

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (the **Sub-Contractor**);
- (2) NORTH DEVON DISTRICT COUNCIL of Lynton House, Commercial Road, Barnstaple, Devon EX31 1DG (the **Beneficiary**); and
- (3) [[FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (the **Contractor**).]

**BACKGROUND**

- (A) Pursuant to a development agreement dated [] the Beneficiary has engaged the Contractor to carry out [SET OUT WORKS] (the **Works**) under a contract dated [DATE].
- (B) The Contractor has engaged the Sub-Contractor under a contract (the **Sub-Contract**) dated [DATE] to carry out and complete the certain works (the **Sub-Contract Works**) forming part of the Works.
- (C) Under the Sub-Contract the Sub-Contractor has agreed to give the Beneficiary the warranties and rights set out in this deed.
- (D) The Contractor is a party to this deed to acknowledge the rights of the Sub-Contractor and the Beneficiary should the Beneficiary take over the Contractor's position under the Sub-Contract.

**AGREED TERMS**

1. The Sub-Contractor warrants that it has complied with and will comply with the Sub-Contract. In the event of a breach of this warranty:
  - 1.1 the Sub-Contractor shall be entitled in any action or proceedings by the Beneficiary to rely on any term in the Sub-Contract and to raise the equivalent rights (except for any rights of set-off or deduction) in defence of liability as it would have against the Contractor under the Sub-Contract; and

- 1.2 the obligations of the Sub-Contractor under or pursuant to clause 1 shall not be released or diminished by the appointment of any person by the Beneficiary to carry out any independent enquiry into any relevant matter.
2. The Sub-Contractor further warrants that he has not used and will not use materials in the Sub-Contract Works other than in accordance with the guidelines contained in the edition of “Good Practice in Selection of Construction Materials (Ova Arup & Partners)” current at the date of the Sub-Contract. In the event of breach of this warranty the provisions of clause 1 shall apply.
3. The Beneficiary has no authority to issue any direction or instruction to the Sub-Contractor in relation to the Sub-Contract unless and until the Beneficiary has given notice under clause 5 or clause 9.
4. The Beneficiary has no liability to the Sub-Contractor in respect of amounts due under the Sub-Contract unless and until the Beneficiary has given notice under clause 5 or clause 9.
5. The Sub-Contractor agrees that in the event of the termination of the Building Contract on the actions of the Beneficiary, the Sub-Contractor shall, if so required by notice in writing given by the Beneficiary and subject to clause 10, accept the instructions of the Beneficiary or its appointee to the exclusion of the Contractor in respect of the Sub-Contractor Works upon the terms and conditions of the Sub-Contract. The Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Beneficiary under this clause 5 as conclusive evidence for the purposes of the Sub-Contract of the termination of the Building Contract by the Beneficiary and further acknowledges that such acceptance of the instructions of the Beneficiary to the exclusion of the Contractor shall not constitute a breach of the Sub-Contractor’s obligations to the Contractor under the Sub-Contract.
6. The Sub-Contractor shall not exercise any right of termination of its employment under the Sub-Contract without having first:

- 6.1 copied to the Beneficiary any written notices required by the Sub-Contract to be sent to the Contractor prior to the Sub-Contractor being entitled to give notice under the Sub-Contract that its employment under the Sub-Contract is terminated; and
- 6.2 given to the Beneficiary written notice that it has the right under the Sub-Contract forthwith to notify the Contractor that its employment under the Sub-Contract is terminated.
7. The Sub-Contractor shall not treat the Sub-Contract as having been repudiated by the Contractor without having first given to the Beneficiary written notice that it intends so to inform the Contractor.
8. The Sub-Contractor shall not:
  - 8.1 issue any notification to the Contractor to which clause 6.2 refers; or
  - 8.2 inform the Contractor that it is treating the Sub-Contract as having been repudiated by the Contractor as referred to in the clause 7 before the lapse of 14 days from receipt by the Beneficiary of the written notice by the Sub-Contractor which the Sub-Contractor is required to give under clause 6.2 and clause 7.
9. The Beneficiary may, not later than the expiry of the 14 days referred to in clause 8, require the Sub-Contractor by notice in writing and subject to clause 10 to accept the instructions of the Beneficiary or its appointee to the exclusion of the Contractor in respect of the Sub-Contract Works upon the terms and conditions of the Sub-Contract. The Contractor acknowledges that the Sub-Contractor shall be entitled to rely on a notice given to the Sub-Contractor by the Beneficiary under this clause 9 and that acceptance by the Sub-Contractor of the instructions of the Beneficiary to the exclusion of the Contractor shall not constitute any breach of the Sub-Contractor's obligations to the Contractor under the Sub-Contract. Provided that, subject to clause 10, nothing in this clause 9 shall relieve the Sub-Contractor of any liability it may have to the Contractor for any breach by the Sub-Contractor of the Sub-Contract or where the Sub-Contractor has wrongfully served notice under the Sub-Contract that it is entitled to terminate its employment under

the Sub-Contract or has wrongfully treated the Sub-Contract as having been repudiated by the Contractor.

10. It shall be a condition of any notice given by the Beneficiary under clause 5 or clause 9 that the Beneficiary or its appointee accepts liability for payment of the sums due and payable to the Sub-Contractor under the Sub-Contract and for performance of the Contractor's obligations including payment of any sums outstanding at the date of such notice. Upon the issue of any notice by the Beneficiary under clause 5 or clause 9, the Sub-Contract shall continue in full force and effect as if no right of termination of the Sub-Contractor's employment under the Sub-Contract, nor any right of the Sub-Contractor to treat the Sub-Contract as having been repudiated by the Contractor had arisen and the Sub-Contractor shall be liable to the Beneficiary and its appointee under the Sub-Contract in lieu of its liability to the Contractor. If any notice given by the Beneficiary under clause 5 or clause 9 requires the Sub-Contractor to accept the instructions of the Beneficiary's appointee, the Beneficiary shall be liable to the Sub-Contractor as guarantor for the payment of all sums from time to time due to the Sub-Contractor from the Beneficiary's appointee.
11. The Sub-Contractor grants to the Beneficiary an irrevocable, royalty-free, non-exclusive licence to copy and use all existing and future plans, drawings, specifications, schedules, reports, models, calculations, correspondence and other documents (including any computer software developed by the Sub-Contractor and used to generate them and any designs contained in them) (the **Material**) prepared or provided by or for the Sub-Contractor for or in connection with the Works including, without limitation, the construction, completion, maintenance, letting, sale, promotion, advertisement, reinstatement, refurbishment and repair of the Works. Such licence shall enable the Beneficiary to copy and use the Material for the extension of the Works but shall not include a licence to reproduce the designs contained in them for any extension of the Works. The Beneficiary shall be permitted to assign the licence and/or grant sub-licences without the consent of the Sub-Contractor.

12. Where the Sub-Contract requires the Sub-Contractor to take out and maintain professional indemnity insurance, the Sub-Contractor shall, upon request, provide to the Beneficiary evidence that the insurance required is being maintained. If the insurance is no longer generally available at commercially reasonable rates, the Sub-Contractor shall notify the Beneficiary immediately and co-operate with the Beneficiary and the Contractor in seeking means by which the Sub-Contractor can be protected against professional liability claims arising out of the Sub-Contract Works.
13. The rights contained in this deed may be assigned without the consent of the Sub-Contractor by the Beneficiary by way of absolute legal assignment, to another person (B1) and by B1, by way of absolute legal assignment, to another person (B2). In such cases the assignment shall only be effective upon written notice thereof being given to the Sub-Contractor. No further or other assignment of the Beneficiary's rights will be permitted and in particular B2 shall not be entitled to assign these rights.
14. Any notice to be given by one party to another pursuant to this deed shall be duly given if delivered by hand or sent by prepaid first-class post or by recorded signed for or special delivery post (or the equivalent forms of post current at the date of the notice) to the recipient at such address as he may from time to time notify to the sender or (if no such address is then current) his last known principal business address or (where a body corporate) its registered or principal office. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting.
15. No action or proceedings for any breach of this deed shall be commenced against the Sub-Contractor after the expiry of 12 years from the date of practical completion of the Sub-Contract Works.
16. Notwithstanding the rights contained in this deed, the Sub-Contractor shall have no liability to the Beneficiary for delay under the Sub-Contract unless and until the Beneficiary serves notice pursuant to clause 5 or clause 9. For the avoidance of doubt, the Sub-Contractor shall not be required to pay

liquidated damages in respect of the period of delay where the same has been paid to or deducted by the Contractor.

17. This deed shall be governed and construed in accordance with the laws of England and the English courts shall have jurisdiction over any dispute or difference between the Sub-Contractor and the Beneficiary that arises out of or in connection with this deed.

IN WITNESS whereof this deed has been executed on the date first above written

**EXECUTED AS A DEED**

by **[SUB-CONTRACTOR]** acting  
by a Director  
and its Secretary/two  
Directors

.....  
Director

.....  
Director/Company  
Secretary

The **COMMON SEAL** of  
**NORTH DEVON**  
**DISTRICT COUNCIL**  
was affixed in the  
presence of

.....  
Authorised signatory

**EXECUTED AS A DEED**  
by **[BUILDING**  
**CONTRACTOR]** acting  
by a Director  
and its Secretary/two  
Directors

.....

Director

.....

Director/Company

Secretary

## **PART 2 – Building Contractor collateral warranty**

**Dated**

**20**

**[BUILDING CONTRACTOR] (1)**

**NORTH DEVON DISTRICT COUNCIL (2)**

**NORTH DEVON HOMES LTD (3)**

**DUTY OF CARE DEED**

**relating to**

THIS DEED is made on

20

## BETWEEN:

- (1) **[BUILDING CONTRACTOR]** (Company No. [ ]), whose registered office is at [ ] (the **Building Contractor**);
- (2) **NORTH DEVON DISTRICT COUNCIL** of Lynton House, Commercial Road, Barnstaple, Devon EX31 1DG (the **Council**), (which expression includes its permitted successors in title and assigns); and
- (3) **NORTH DEVON HOMES LIMITED** (Company No. 03674687), with registered office is at Westacott Road, Barnstaple, Devon EX32 8TA (**NDH**).

## BACKGROUND

- (A) By a development agreement dated [ ] (the **Agreement**) the Council has appointed NDH to procure the carrying out of the Works.
- (B) By a contract dated [ ] (the **Building Contract**) NDH has appointed the Building Contractor to carry out the [design and] construction of the Works.
- (C) The Building Contractor is obliged under the Building Contract to give a warranty in this form in favour of the Council.
- (D) The Building Contractor and NDH have agreed to execute this Deed in favour of the Council.

## 1 DEFINITIONS AND INTERPRETATIONS

Unless expressly defined otherwise in this Deed any defined term in this Deed shall have the same meaning given to such term in the Building Contract.

### **Construction Products Regulations**

the Construction Products Regulations 2013 (SI 2013/1387), the Construction Products Regulation (305/2011/EU), the Construction Products Regulations 1991 (SI 1991/1620) and the Construction Products Directive (89/109/EC).

### **Deleterious**

materials, equipment, products or kits that are generally accepted, or generally suspected, in the construction industry at the relevant time as:

- (a) posing a threat to the health and safety of any person; or
- (b) posing a threat to the structural stability, performance or physical integrity of the Works or any part or component of the Works; or
- (c) reducing, or possibly reducing, the normal life expectancy of the Works or any part or component of the Works; or

- (d) not being in accordance with any relevant British Standard, relevant code of practice, good building practice or any applicable agrément certificate issued by the British Board of Agrément; or
- (e) having been supplied or placed on the market in breach of the Construction Products Regulations.

### **Intellectual Property Rights**

any and all patents, trade marks, service marks, copyright, database rights, moral rights, rights in design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attaching thereto which is created, brought into existence, acquired, used or intended to be used by the Building Contractor for the purpose of carrying out the Works;

### **Project Data**

- (i) all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the relevant Facility (as defined in the Agreement) in each case that is used by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract; and
- (ii) any other materials, documents or data acquired or brought into existence or used in relation to the Works or the Building Contract by or on behalf of the Building Contractor in connection with the provision of the Works or the performance of the Building Contractor's obligations under the Building Contract.

## **2 BUILDING CONTRACTOR'S WARRANTY AND LIABILITY**

- 2.1 The Building Contractor warrants to the Council that it has carried out and will continue to carry out its duties under the Building Contract in accordance with the Building Contract and that it has exercised and will continue to exercise, in carrying out the design of the Works, the level of skill and care reasonably to be expected from an appropriately qualified and competent professional designer providing those services in relation to a project of a similar size and scope to the Works. In particular and without limiting the generality of the foregoing the Building Contractor covenants with the Council that it has carried out and will carry out and complete the Works in accordance with the Building Contract and duly observe and perform all its duties and obligations thereunder;
- 2.2 The Building Contractor shall have no liability under clause 2.1 or clause 10 of this Deed that is greater or of longer duration than it would have had as if in lieu of this Deed the Council had been a party to the Building Contract as joint employer and the Building Contractor shall be entitled in any action or proceedings by the Council to raise equivalent rights in defence of liability (except for set off or counterclaim).

- 2.3 The Building Contractor shall have no liability to the Council in respect of any delay in the completion of the Works howsoever caused save to the extent that the liability arises under the Building Contract and the Council shall have exercised its right to step in under clause 9 of this Deed. Any claim in relation to a delay in completion of the Works but not otherwise will be extinguished to the extent that the Building Contractor has had deducted liquidated damages under the relevant clause of the Building Contract.
- 2.4 Nothing in this Deed shall entitle the Council to exercise its rights under this clause 2 unless:
- 2.4.1 the Agreement (or NDH's employment under it) has been terminated; or, in the absence of such termination
- 2.4.2 NDH has not (either itself or through its supply chain (whether through the Building Contractor or otherwise)) satisfied the potential claim by the Council under this clause 2, including addressing and/or remedying the matter or circumstance giving rise to such claim, within a reasonable time of such matter or circumstance arising,

provided that this clause 2.4 shall not apply where any delay in the exercise of the Council's rights under Deed might otherwise lead to their becoming statute-barred.

### 3 INTELLECTUAL PROPERTY

- 3.1 The Building Contractor shall make available to the Council free of charge (and hereby irrevocably licences the Council to use) all Project Data that might reasonably be required by the Council. The Building Contractor shall obtain all necessary licences, permissions and consents necessary for it to make the Project Data available to the Council on these terms, for the purposes of:
- 3.1.1 the Council using the Works for the provision of Services (as defined in the Agreement) and for ancillary purposes, its duties under the Agreement and/or any statutory duties that the Council may have; and
- 3.1.2 following termination of the Agreement or of NDH's employment under it, the design or construction of the Works and/or the operation, maintenance or improvement of the Works,

(together, the **Approved Purposes**), and in this clause 4 "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly. The Council will not hold the Building Contractor liable for any use it may

make of the Project Data for any purpose other than the Approved Purposes.

### 3.2 The Building Contractor:

3.2.1 hereby grants to the Council, free of charge, an irrevocable non-exclusive and transferable (subject to the restrictions continued in clause 7 of this Deed) licence to use the Intellectual Property Rights that are or become vested in the Building Contractor for the Approved Purposes; and

3.2.2 shall (where any Intellectual Property Rights are or become vested in a third party) use all reasonable endeavours to procure the grant of a like licence to that referred to in clause 3.2.1 to the Council,

in both cases, solely for the Approved Purposes.

3.3 The Building Contractor warrants to the Council that it has used the standard of skill, care and diligence as set out in clause 2.1 to see that the Project Data (save to the extent duly appointed sub-contractors have been used to prepare the same) are its own original work and that in any event their use in connection with the Works will not infringe the rights of any third party.

3.4 Where a claim or proceeding is made or brought against the Council that arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works infringes or the Works themselves infringe any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Council otherwise than in accordance with this Deed, the Building Contractor shall indemnify the Council at all times from and against all Direct Losses and Indirect Losses (as defined in the Agreement) arising as a result of such claims and proceedings.

## 4 INSURANCE

4.1 The Building Contractor hereby covenants with the Council to:

4.1.1 [take out and maintain professional indemnity insurance cover with a limit of indemnity that shall be a minimum of [INSERT AMOUNT (£)] either each and every loss or in the aggregate in relation to the Works (if in the aggregate then in any one (1) year of insurance a minimum of one (1) automatic reinstatement of the aggregate indemnity limit is required) (**PI Insurance**) and that it will maintain such insurance with reputable insurers carrying on business in the European Union from the date hereof until

twelve (12) years after service of the final certificate, provided that such insurance is generally available in the market to design and build contractors at commercially reasonable rates and terms and provided further that payment of any increased or additional premiums or more onerous terms required by insurers by reason of the Building Contractor's own claims record or other acts, omissions, matters or things peculiar to the Building Contractor will be deemed to be within the commercially reasonable rates and terms;]

4.1.2 provide evidence (as and when reasonably required by the Council) satisfactory to the Council of the PI Insurance being in full force and effect from the date of the Building Contract (such evidence to include details of the cover);

4.1.3 provide the Council with notice of:

4.1.3.1 any cancellation of the PI Insurance not less than thirty (30) days prior to the relevant cancellation date; and

4.1.3.2 any adverse material change to or suspension of cover relevant to the Works not less than thirty (30) days prior to such relevant change or suspension;

4.1.3.3 inform the Council as soon as reasonably practicable of any claim under the PI Insurance in respect of the Works in excess of one million pounds (£1,000,000) and provide such information to the Council as the Council may reasonably require in relation to such claim and provide notice of any potential breach of the aggregate limit of the policy; and

4.1.3.4 indemnify the Council in respect of any subrogation claim by the insurers brought in connection with any claim made under the PI Insurance.

## 5 NOTICES

Any notice to be given by any party will be sufficiently served if sent by hand, by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on the date of delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time recorded on the facsimile report sheet, provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on

the next Business Day. Any notice sent by post will be deemed to have been duly served at the expiration of forty-eight (48) hours after the time of posting if the end of that period falls before 4.45pm on a Business Day and otherwise on the next Business Day.

### **6 ASSIGNMENT**

The benefit of and the rights of the Council under this Deed may be assigned without the consent of the Building Contractor on two (2) occasions only and the Council will notify the Building Contractor in writing following any such assignment specifying the name and address of the assignee and the date of the assignment. The Building Contractor will not contend that any such assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original beneficiary hereunder or by reason that the original beneficiary or any intermediate beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Sites or that the original beneficiary or any intermediate beneficiary has not suffered any, or as much, loss.

### **7 AUTHORITY'S REMEDIES**

The rights and benefits conferred upon the Council by this Deed are in addition to any other rights and remedies it may have against the Building Contractor including without prejudice to the generality of the foregoing any remedies in negligence.

### **8 INSPECTION OF PROJECT DATA**

The Building Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any inspection or approval of the Project Data or attendance at site meetings or other enquiry or inspection which the Council may make or procure to be made for its benefit or on its behalf.

## 9 STEP-IN RIGHTS IN FAVOUR OF THE COUNCIL

- 9.1 The Building Contractor will not exercise or seek to exercise any right which may be or become available to it to terminate or treat as terminated or repudiated the Building Contract or its engagement under it or discontinue or suspend the performance of any duties or obligations thereunder without first giving to the Council not less than twenty (20) Business Days' prior written (seven (7) days' prior written notice of suspension in the event of non-payment under the Building Contract) notice specifying the Building Contractor's ground for terminating or treating as terminated or repudiated the Building Contract or its engagement under it or discontinuing or suspending its performance thereof and stating the amount (if any) of monies outstanding under the Building Contract. Within such period of notice:
- 9.1.1 the Council may give written notice to the Building Contractor that the Council will thenceforth become the client under the Building Contract to the exclusion of NDH and thereupon the Building Contractor will admit that the Council is its client under the Building Contract and the Building Contract will be and remain in full force and effect notwithstanding any of the said grounds;
  - 9.1.2 if the Council has given such notice as aforesaid or under clause 9.3, the Council shall accept liability for NDH's obligations under the Building Contract and will as soon as practicable thereafter remedy any outstanding breach by NDH that properly has been included in the Building Contractor's specified grounds and which is capable of remedy by the Council; and
  - 9.1.3 if the Council has given such notice as aforesaid or under clause 9.3, the Council will, from the service of such notice, become responsible for all sums properly payable to the Building Contractor under the Building Contract accruing due after the service of such notice but the Council will, in paying such sums, be entitled to the same rights of set-off and deduction as would have applied to NDH under the Building Contract.
- 9.2 Notwithstanding anything contained in this Deed and notwithstanding any payments which may be made by the Council to the Building Contractor, the Council will not be under any obligation to the Building Contractor nor will the Building Contractor have any claim or cause of action against the Council unless and until the Council has given written notice to the Building Contractor pursuant to clause 9.1.1 or clause 9.3 of this Deed.

- 9.3 The Building Contractor further covenants with the Council that if the employment of NDH under the Agreement is terminated or, if the Agreement is terminated by the Council, the Building Contractor, if requested by the Council by notice in writing and subject to clause 9.1.2 and clause 9.1.3, will accept the instructions of the Council to the exclusion of NDH in respect of its duties under the Building Contract upon the terms and conditions of the Building Contract and will if so requested in writing enter into a novation agreement whereby the Council is substituted for NDH under the Building Contract.
- 9.4 If the Building Contractor is requested to enter into a novation agreement pursuant to clause 9.3, NDH agrees to enter into the same at the request of the Council.
- 9.5 NDH acknowledges that the Building Contractor will be entitled to rely on a notice given to the Building Contractor by the Council under clause 9.3 as conclusive evidence that the employment of NDH under the Agreement has been terminated or that the Agreement has been terminated.
- 9.6 The Council may, by notice in writing to the Building Contractor, appoint another person to exercise its rights under this clause 9 subject to the Council remaining liable to the Building Contractor as guarantor for its appointee in respect of its obligations under this Deed.
- 9.7 As from the date of service of notice under clauses 9.1.1 or 9.3 to the extent that the Building Contract operates by reference to the existence and application of the Agreement, the Building Contract shall be administered and construed as though the Agreement were continuing and the Building Contract shall therefore continue, subject to amendment only as necessary to reflect the fact that the Agreement may in fact have been terminated and the Council has undertaken the obligations set out in clause 9.1.2.
- 9.8 Upon request by the Council the Building Contractor agrees to co-operate with the Council in determining the duties performed or to be performed by the Building Contractor and to provide a copy of the Building Contract and any variations thereto and details of all monies paid and due under the Building Contract.

## **10 STANDARDS OF PRODUCTS AND MATERIALS**

The Building Contractor warrants that it has only used and will only use new materials in carrying out the Works unless the Council agrees otherwise in writing or the contrary is set out in the Approved Documents (as defined in the Agreement)) and all goods used or included in the Works shall be of satisfactory quality, and the Building Contractor warrants that it has not used or included and will not use or include in the Works any of those products and materials considered to be Deleterious nor any products or materials not in

conformity with relevant British or European Union standards or codes of practice or which, at the time of use, are widely known to building contractors, contractors or members of the relevant design profession within the European Union to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used.

### **11 SUB-CONTRACTORS**

Following a written request from the Council the Building Contractor will (unless it has already done so) and/ or procure that its Principal Building Sub-Contractors (as defined in the Agreement) and members of the Professional Team (as defined in the Agreement) each execute a deed of collateral warranty in the relevant form specified in the Building Contract in favour of any person in whose favour the Building Contract obliges the Building Contractor to give or procure the giving of such a warranty.

### **12 SEVERABILITY**

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

### **13 WAIVER**

13.1 No term or provision of this Deed shall be considered as waived by any party to this Deed unless a waiver is given in writing by that party.

13.2 No waiver under clause 14.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Deed unless (and only to the extent) expressly stated in that waiver.

### **14 THIRD PARTY RIGHTS**

No term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not party to this Deed. This clause 15 does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

### **15 GOVERNING LAW AND JURISDICTION**

This Deed and all non-contractual obligations in connection with this Deed shall be governed by and construed in all respects in accordance with the laws of England and Wales. The English Courts shall have exclusive jurisdiction to settle any disputes that may arise out of or in connection with this Deed.

## **16 CONTRACTOR ACKNOWLEDGEMENT**

NDH has entered into this Deed in order to acknowledge the arrangements effected hereby and undertakes to each of the Council and the Building Contractor to observe the provisions of this Deed at all times and not in any way to prejudice or affect the enforcement hereof or to do or permit to be done anything which would be a breach hereof.

## **17 COUNTERPARTS**

This Deed may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by all the parties shall constitute a full and original instrument for all purposes.

**IN WITNESS** of which this document is executed as a deed and is delivered on the date first set out above

# Agenda Item 13

Appendix A

Executed as a deed, but not delivered )  
until the first date specified on page )  
1, by **[BUILDING CONTRACTOR]** )  
acting by a director in the presence of )  
a witness:

Signature .....

Name (block capitals) .....

**Director**

Witness signature .....

Witness name  
(block capitals) .....

Witness address .....

.....

.....

# Agenda Item 13

Appendix A

Executed as a deed, but not delivered )  
until the first date specified on page )  
1, by **NORTH DEVON HOMES** )  
**LIMITED** acting by a director in the )  
presence of a witness:

Signature .....

Name (block capitals) .....

**Director**

Witness signature .....

Witness name  
(block capitals) .....

Witness address .....

.....

.....

Executed as a deed, but not delivered )  
until the first date specified on page )  
1, by **NORTH DEVON DISTRICT** )  
**COUNCIL** acting by: )

-----  
**Authorised Signatory**

**SCHEDULE 2**  
**Professional indemnity insurance**

<b>Role</b>	<b>Identity</b>	<b>Required level of insurance</b>

Signed for and on behalf of **NORTH  
DEVON DISTRICT COUNCIL** by  
an authorised signatory:

.....

Signed for and on behalf of **NORTH  
DEVON HOMES LIMITED** by a  
director:

.....

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