

s106 Agreement for Permit Free & Contributions RBKC Precedent 30th April 2013

THIS DEED is made the day of Two Thousand and

BETWEEN

- (1) **THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA** of the Town Hall, Hornton Street, London W8 7NX (“**the Council**”)
- (2) **X LIMITED** (Co. Reg. No. X or eg incorporated in the British Virgin Islands) whose registered office is [insert] but whose address for service is [insert] (“**the Owner**”)
- (3) [Add other interested parties to the Land, e.g Lessees]
- (4) **X PLC** (Co. Reg. No. X) of [insert] (“**the Mortgagee**”)

WHEREAS

- A. The Council is the local planning authority for the administrative area of the Royal Borough of Kensington and Chelsea for the purposes of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (“**the Act**”)
- B. The Owner is registered at the Land Registry with freehold title absolute in respect of the Land under title number [insert]
- C. [Deal with other interests in the Land]
- D. The Mortgagee has the benefit of a charge dated [insert] granted by the Owner
- E. The Planning Application was made to the Council by [the Owner]
- F. The Council has decided to grant planning permission in respect of the Development following completion of a planning obligation agreement for the purpose of making acceptable arrangements for the carrying out of the Development (“**this Deed**”)

NOW THIS DEED WITNESSES AS FOLLOWS:-

1. INTERPRETATION

- 1.1. In this Deed the following words and expressions shall unless the context otherwise

requires have the following meanings:-

WORDS AND EXPRESSIONS

MEANINGS

**“Community Facilities
Contribution”**

means the sum of £X.00 ([insert] pounds) Index Linked to be paid to the Council for the Community Facilities Provision

**“Community Facilities
Provision”**

means the provision support and/or subsidy of community facilities and related measures within the administrative area of the Royal Borough of Kensington and Chelsea or such other measures as the Council shall determine in its absolute discretion

“Development”

means the development of the Land described in Schedule 1

“Education Contribution”

means the sum of £X.00 ([insert] pounds) Index Linked and payable to the Council for the Education Facilities Provision

**“Education Facilities
Provision”**

means the provision of new educational facilities and/or the improvement of and/or support and/or subsidy of educational facilities for nursery primary and secondary school places within the administrative area of the Royal Borough of Kensington and Chelsea or such other facilities as may be required as determined by the Council in its absolute discretion

“Executive Director”

means the Executive Director of Planning and Borough Development and shall be deemed to mean the officer for the Council from time to time holding that appointment or (if no officer holds that appointment) carrying out the duties of that appointment

“Health Contribution”

means the sum of £X.00 ([insert] pounds) Index Linked and payable to the Council for the Health Facilities Provision

“Health Facilities Provision”

means the provision of new and/or improved health facilities and/or the support and/or subsidy of healthcare facilities and related measures within the administrative area of the Royal Borough of Kensington and Chelsea the nature and extent of which shall be determined by the Council in its absolute

discretion

“Implementation”

means the carrying out of any act pursuant to the Planning Permission which constitutes a material operation within the meaning of Section 56 of the Act and material operations shall be construed as being carried out at the earliest date on which any material operation is begun and “Implement” and “Implemented” shall be construed accordingly

“Index Linked”

means the recalculation of any payment specified in this Deed by applying the following formula:

$$A \times \frac{B}{C} = D$$

Where:

A = the payment specified in this Deed in pounds sterling

B = the figure shown in the RPIX for the period last published prior to the date of the payment to made under this Deed

C = the figure shown in the RPIX for the period immediately prior to the date of this Deed

D = the recalculation sum in pounds sterling payable under this Deed or if the RPIX shall cease to be compiled or the formula shall otherwise be incapable of operation then such other equivalent means as shall be proposed by the Owner or Freeholder to recalculate such payment with the intent that it shall have like effect and be approved by the Council

“Land”

means the land at [insert] which is registered at the Land Registry under Title Number [insert] and which for identification purposes only is shown edged in [bold black and cross-hatched] on the Plan annexed to this Deed

“Monitoring Fee”

means the financial contribution in the sum of £XX.00 ([insert] pounds) payable to the Council on date of completion of this Deed to monitor compliance with or default of the covenants and obligations contained within this Deed by the Planning Obligations Monitoring Officer

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|--|---|
| “Occupation” | means occupation for the purposes permitted by the Planning Permission but does not include occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations and “Occupy” and “Occupied” shall be construed accordingly |
| “Parking Permit” | means a permit issued by the Council to residents allowing the parking of a vehicle in a residents parking bay on the highway within the area of the Council but not including a disabled person’s “purple badge” issued pursuant to Section 21 of the Chronically Sick and Disabled Persons Act 1970 |
| “Permit Free Residential Unit(s)” | means the [insert number] residential units to be provided as part of this Development and [shown edged in bold black <i>if necessary</i> and annotated eg “DWELLING TO BE PERMIT FREE” on Plan 2] |
| “Plan 1” | means the plan attached to this Undertaking showing the Land and numbered “Plan 1” |
| “Plan 2” | means the plan attached to this Undertaking showing the Permit Free Residential Unit and numbered “Plan 2” |
| “Planning Application” | means the application for [full] planning permission submitted to the Council for the Development made under the Council's reference number PP/[insert] |
| “Planning Obligations Monitoring Officer” | means any officer of the Council from time to time allocated to deal with monitoring of planning obligations and covenants provided by section 106 of the Act |
| “Planning Permission” | means the planning permission which may be granted pursuant to the Planning Application |
| [“Residential Unit(s)”] | [if necessary means [describe] to be provided pursuant to the Planning Permission] |
| “RPIX” | has the definition afforded from time to time by the Office for National Statistics and for the avoidance of doubt is the figure shown as the Retail Prices Index Excluding Mortgage Interest |

Payments (RPIX) published by the Office for National Statistics every month

- 1.2. Words in this Deed importing the singular meaning shall where the context so admits include the plural meaning and vice versa
- 1.3. Words in this Deed of the masculine gender shall include the feminine and neuter genders and vice versa and words denoting natural persons shall include corporations and vice versa
- 1.4. References in this Deed to any statutes or statutory instruments shall include and refer to any statute or statutory instrument modifying extending consolidating or replacing them respectively from time to time and for the time being in force and shall include all instruments orders plans regulations permissions and directions for the time being made issued or given under the Act or deriving validity from it
- 1.5. Covenants made hereunder if made by more than one person are made jointly and severally
- 1.6. Words denoting an obligation on a party to do any act matter or thing include an obligation to procure that it be done and words placing a party under a restriction include an obligation not to cause permit or knowingly suffer any infringement of the restriction
- 1.7. Headings contained in this Deed are for reference purposes only and are not incorporated into this Deed and shall not be deemed to be an indication of the meaning of the parts of this Deed to which they relate
- 1.8. References to any party to this Deed shall include the successors in title to that party and to any person deriving title through or under that party and in the case of the Council and the successors to their respective statutory functions
- 1.9. Where in this Deed reference is made to any clause paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause paragraph or schedule or recital in this Deed

2. LEGAL EFFECT

- 2.1. This Deed is made pursuant to Section 106 of the Act Section 111 of the Local Government Act 1972 and Section 2 of the Local Government Act 2000 and all other powers so enabling

- 2.2. The covenants restrictions and requirements imposed upon the Owner [and other parties **insert eg the Lessee**] under this Deed create planning obligations pursuant to Section 106 of the Act and are enforceable by the Council as local planning authority against the Owner and the Owner's successors in title and assigns etc [**insert references to other parties e.g. the Lessee**] and which bind each and every part of the Land
- 2.3. The terms of this Deed come into effect on the date of this Deed other than Clauses 3.2 and 3.3 which will come into effect upon the grant of the Planning Permission
- 2.4. Nothing contained or implied in this Deed shall prejudice or affect the rights, powers, duties and obligations of the Council in the exercise of their functions as Local Planning Authority and their rights, powers, duties and obligations under all public and private statutes, byelaws and regulations may be as fully and effectually exercised as if the Council were not a party to this Deed
- 2.5. Insofar as any provisions in this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity, illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed
- 2.6. No waiver (whether express or implied) by the Council of any breach or default in performing or observing any of the covenants, terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the said covenants, terms or conditions or from acting upon any subsequent breach or default
- 2.7. Nothing in this Deed shall be construed as a grant of planning permission
- 2.8. The covenants restrictions and obligations herein shall be enforceable without any limit of time against the Owner and its respective successors in title and assigns or any person claiming title through or under the Owner to the Land or any part thereof [**insert references to other parties e.g. the Lessee**] as if that person had also been an original covenanting party in respect of the interest or estate for the time being held by that person **PROVIDED THAT** no person shall be liable for any breach of the covenants restrictions or obligations contained in this Deed occurring after he has parted with the whole of his interest in the Land or the part in respect of which such breach occurs save and without prejudice to the rights of the Council in relation to any subsisting antecedent breach of those covenants restrictions or obligations prior to the parting of such interest
- 2.9. In accordance with the provisions of the Contracts (Rights of Third Parties) Act 1999 it

is hereby declared that none of the terms of this Deed shall in the absence of any express provision to the contrary be construed as being enforceable by any third party

- 2.10. This Deed is governed by and interpreted in accordance with the Law of England and the parties submit to the non-exclusive jurisdiction of the courts of England

3. THE OWNER'S [THE LESSEE'S] AND THE COUNCIL'S COVENANTS

- 3.1. The Owner/Lessee hereby covenants with the Council to pay on the execution hereof the Monitoring Fee and the Council's reasonable and proper legal costs incurred in the negotiation preparation and execution of this Deed
- 3.2. The Owner/Lessee hereby covenants with the Council to observe and perform and cause to be observed and performed the obligations covenants and restrictions contained in Schedule 2
- 3.3. The Council covenants as set out in Schedule 3
- 3.4. **[insert references to other parties e.g. the Lessee]**

4. FURTHER TERMS

- 4.1. The covenants in this Deed shall be treated and registered by the Council as local land charges for the purposes of the Local Land Charges Act 1975
- 4.2. Nothing in this Deed shall prohibit or limit the right to develop any part of the Land in accordance with any planning permission (other than the Planning Permission or modification, variation or amendment thereof) granted after the date of the Planning Permission
- 4.3. The Mortgagee consents to the Owner entering into the obligations contained in this Undertaking and acknowledges that the Land shall be bound by the restrictions and obligations contained in this Undertaking **PROVIDED THAT** the Mortgagee shall not be liable in respect of any breach of the terms of this Undertaking unless and until he takes possession of the Land or otherwise exercises any contractual or statutory power in relation thereto
- 4.4. **[insert references to other parties e.g. the Lessee]**

5. NOTICE PROVISIONS

- 5.1. The Owner **[insert references to other parties e.g. the Lessee]** shall not implement

the Planning Permission unless not less than ten (10) working days prior written notice of their intention to Implement the Planning Permission has been given to the Executive Director

- 5.2. The Owner **[insert references to other parties e.g. the Lessee]** shall notify the Executive Director in writing no later than ten (10) working days of the Planning Permission being Implemented
- 5.3. The Owner **[insert references to other parties e.g. the Lessee]** shall give the Executive Director immediate written notice of any change in ownership of any of the interests in the Land and such notice shall give details of the transferee's or lessee's full name and registered office (if a company or usual address if not)
- 5.4 Any notice agreement or approval required under this Deed shall be in writing and delivered either personally or by recorded delivery post and shall be addressed to:-
- 5.4.1 in the case of the Council to the Executive Director at The Royal Borough of Kensington and Chelsea, The Town Hall, Hornton Street, London W8 7NX
- 5.4.2 in the case of the Owner to its address at party recital (2)
- 5.4.3 in the case of the **Lessee** to its address at party recital (3)
- 5.4.4 in the case of the Mortgagee to its address at party recital (4)

6. **INTEREST**

Where any sum or amount which the Owner **[insert references to other parties e.g. the Lessee]** is obliged to pay to the Council pursuant to the obligations set out in this Deed is not paid on the date on which it is due and remains unpaid for a period exceeding thirty (30) days then (and without prejudice to any other right of the Council) interest thereon at the interest rate of three percent (3%) per annum above the base lending rate of National Westminster Bank plc as amended from time to time shall immediately be paid on the sum outstanding by the Owner **[insert references to other parties e.g. the Lessee]** to the Council from the date on which the payment (or part thereof) became due to the date of actual receipt by the Council in addition to the outstanding balance of the payment

7. **OWNER'S [AND THE LESSEE'S] CAPACITY/IES TO ENTER INTO THIS DEED**

The Owner **[insert references to other parties e.g. the Lessee]** hereby warrants that he has full power to enter into this Deed and that he has obtained all necessary consents from

any mortgagee chargee or any other person having a title or right in the Land

8. INDEXATION

Any sum payable pursuant to Schedule 2 shall be Index Linked (in an upwards direction only) and shall accordingly be increased by the amount calculated in accordance with the definition of Index Linked in this Deed

9. CONSENTS

Where the agreement approval consent or satisfaction of the Council (including by the Executive Director) is required under the terms of this Deed that agreement, approval, consent or satisfaction shall be in writing and shall not be unreasonably withheld or delayed

10. VAT

10.1 All consideration given in accordance with the terms of this Deed shall be exclusive of any VAT properly payable in respect thereof

10.2 If at any time VAT is or becomes chargeable in respect of any supply made in accordance with the terms of this Deed to the extent that VAT had not previously been charged in respect of that supply the person making the supply shall have the right to issue a VAT invoice to the person to whom the supply was made and the VAT shall be paid accordingly

11. REVOCATION

11.1 This Deed shall cease to have effect (insofar as it has not already been complied with and save for any obligations which are already outstanding) if the Planning Permission shall be quashed or revoked without the consent of the Owner or if the Planning Permission shall expire prior to Implementation

11.2 If this Deed is determined pursuant to clause 11.1 the Council will on the written request of the Owner cancel all entries made in the local land charges register in respect of this Deed.

12. DISPUTE RESOLUTION

12.1 In the event of any dispute or difference arising between any of the parties to this Deed in respect of any matter contained in this Deed such dispute or difference shall be referred to an independent and suitable person holding appropriate professional qualifications to be appointed (in the absence of an agreement) by or on behalf of the president for the time being of the professional body chiefly relevant in England with such matters as may be in

dispute and such person shall act as an expert whose decision shall be final and binding on the parties in the absence of manifest error and any costs shall be payable by the parties to the dispute in such proportion as the expert shall determine and failing such determination shall be borne by the parties in equal shares.

- 12.2 In the absence of agreement as to the appointment or suitability of the person to be appointed pursuant to Clause 12.1 or as to the appropriateness of the professional body then such question may be referred by either part to the president for the time being of the Law Society for him to appoint a solicitor to determine the dispute such solicitor acting as an expert and his decision shall be final and binding on all parties in the absence of manifest error and his costs shall be payable by the parties to the dispute in such proportion as he shall determine and failing such determination shall be borne by the parties in equal shares.
- 12.3 Any expert howsoever appointed shall be subject to the express requirement that a decision was reached and communicated to the relevant parties within the minimum practicable timescale allowing for the nature and complexity of the dispute and in any event not more than twenty-eight working days after the conclusion of any hearing that takes place or twenty-eight working days after he has received any file or written representation.
- 12.4 The expert shall be required to give notice to each of the said parties requiring them to submit to him within ten working days of notification of his appointment written submissions and supporting material and the other party will be entitled to make a counter written submission within a further ten working days.
- 12.5 The provisions of this clause shall not affect the ability of the Council to apply for and be granted any of the following: declaratory relief, injunction, specific performance, payment of any sum, damages, any other means of enforcing this Deed and consequential and interim orders and relief.

13 COMMUNITY INFRASTRUCTURE LEVY REGULATIONS 2010

For the purposes of the Community Infrastructure Levy Regulations 2010 ("the Regulations"), the Owner **[insert references to other parties e.g. the Lessee]** hereby affirms that the obligations imposed in this Undertaking are necessary to make the Development acceptable in planning terms, directly related to the Development and are fairly and reasonably related in scale and kind to the Development, so as to satisfy the tests in Regulation 122(2) of the Regulations.

SCHEDULE 1

DESCRIPTION OF THE DEVELOPMENT

[insert description of development from Planning Application **but** check the description against the planning application details on the Council's website as the original definition may have been changed]

[No need to insert PP number nor refer to Drawing Nos]

SCHEDULE 2

OWNER'S COVENANTS

The Owner hereby covenants with the Council as follows:-

1. COMMUNITY FACILITIES CONTRIBUTION

To pay the Community Facilities Contribution to the Council no less than seven working days prior to the Implementation of the Planning Permission and not to Implement or permit the Implementation of the Planning Permission until the Community Facilities Contribution has been paid to the Council and its receipt has been acknowledged in writing by the Executive Director

2. EDUCATION CONTRIBUTION

To pay the Education Contribution to the Council no less than seven working days prior to the Implementation of the Planning Permission and not to Implement or permit the Implementation of the Planning Permission until the Education Contribution has been paid to the Council and its receipt has been acknowledged in writing by the Executive Director

3. HEALTH CONTRIBUTION

To pay the Health Contribution to the Council no less than seven working days prior to the Implementation of the Planning Permission and not to Implement or permit the Implementation of the Planning Permission until the Health Contribution has been paid to the Council and its receipt has been acknowledged in writing by the Executive Director

4. PERMIT FREE

4.1 From the Implementation of the Planning Permission:-

4.1.1 Not to apply to the Council for a Parking Permit in respect of the Residential Unit nor to knowingly permit any owner or occupier of the Residential Unit to apply to the Council for a Parking Permit and if such a permit is issued in respect of the Residential Unit it shall be surrendered to the Council within 7 days of written demand

4.1.2 That all material used for advertising or marketing the Residential Unit for letting or sale will notify prospective owners and occupiers that they will not be entitled to apply for a Parking Permit in respect of the Residential Unit

- 4.1.3 That in respect of every lease granted assigned transferred or otherwise provided after the date of this Deed in respect of the Residential Unit the following covenant or a covenant of substantially the same nature of it shall be imposed (or a covenant of substantially the same nature in respect of any tenancy agreement licence or other instrument entitling Occupation of the Residential Unit):

“the lessee for himself and his successors in title being the owner or owners for the time being [of the terms of years hereby granted] hereby covenant with the lessor and separately with the Mayor and Burgesses of the Royal Borough of Kensington and Chelsea (“the Council”) not to apply for nor knowingly permit an application to be made by any person residing in the premises to the Royal Borough of Kensington and Chelsea for a resident’s parking permit (save for a disabled person’s “purple badge” issued pursuant to section 21 of the Chronically Sick and Disabled Persons Act 1970) in respect of such premises and if such a permit is issued then it shall be surrendered within 7 days of written request to do so from the Council and this covenant shall also be enforceable by the Council under the Contracts (Rights of Third Parties) Act 1999, section 1”

- 4.1.4 To send to the Executive Director a certified copy of the transfers, leases or tenancies within 10 working days of the transfer or the grant or transfer of any lease or tenancy in respect of the Residential Unit

SCHEDULE 3

COUNCIL'S COVENANTS ON EXPENDITURE OF CONTRIBUTIONS

The Council hereby covenants with the Owner/**Lessee** that when the Council receives any sum or amount pursuant to the obligations set out in this Deed the Council will use its best endeavours to:

- (a) hold such sums or amounts separately and interest will accrue at the average monthly seven day bank rate calculated from the rate published daily in the Financial Times;
- (b) use all sums or amounts received from the Owner/**Lessee** for the purposes specified in this Deed and for which they are paid **PROVIDED THAT** for the avoidance of doubt the Council shall be entitled to treat and use any accrued interest thereon as if it were part of the principal sum paid by the Owner/**Lessee**;
- (c) to repay to the person who made any payment in accordance with Schedule 2 of this Deed any such sums or amounts remaining unexpended upon the expiration of fifteen (15) years from the date of payment together with any interest accrued thereon as soon as reasonably practicable after receiving a request from the person who made the payment; and
- (d) Without prejudice to Paragraph (b) above the Council shall also be entitled to expend any sums and amounts received on any reasonable administrative expenses of the Council incurred in providing the purposes specified in this Deed and for which contributions have been paid

IN WITNESS of which this Deed has been executed on the first date before written

THE COMMON SEAL of the **MAYOR**)
AND BURGESSES OF THE ROYAL)
BOROUGH of KENSINGTON AND)
CHELSEA was hereunto affixed)
in the presence of:-)

THE COMMON SEAL OF [COMPANY)
NAME])
Was hereunto affixed to this Deed)
And delivered in the presence of)

Director

Director /Company Secretary

Deeds – Limited Companies (no Seal)

Signed as a Deed by [NAME OF)
COMPANY])
Acting by its authorised signatories)

First Director (Signature)
Print (name)

Second Director /or Company Secretary
[Signature]
(Print name)

(i.e. either 2 directors or 1 director
and Company Secretary)

Individual

Signed by [name of party])
Print name)
In the presence of)

Witness Signature
Witness Name
Witness Address
Witness Occupation

Deeds – A partnership

Signed as a Deed by)
Partner(s) in the firm of)
Authorised to sign on behalf of the)
firm and each and every partner thereof)

Signature of Partner
Print Name
Witness signature
Witness name
Address
Occupation

Signature of Partner
Print Name
Witness signature
Witness name
Address
Occupation

Deeds – Limited Liability partnership

The Common Seal of [Limited Liability Partnership])
was hereunto affixed to this)
Deed and delivered in the presence of)

Member (1) signature
Print name

Member (2) signature
Print name

Deeds – Limited Liability Partnership No common Seal

[Signed as a Deed by (Name of LLP Partner of [Registered office] Acting by its two duly authorised Members)
)
)
)

Member (1) signature
print name

Member (2) signature
print name

**THE MAYOR AND BURGESSES OF
THE ROYAL BOROUGH OF
KENSINGTON AND CHELSEA**

-and-

X LIMITED

-and-

X LIMITED

-and-

X PLC

AGREEMENT

Made pursuant to Section 106 of
the Town and Country Planning
Act 1990 (as amended by the
Planning and Compensation Act 1991)

Re: **Land known as [insert],
London [insert full postcode]
&
PP/[insert full number]**

Tasnim Shawkat
Bi-Borough Director of Law
The Royal Borough of Kensington and Chelsea
The Town Hall
Hornton Street
London
W8 7NX

My Ref: XX/XX
Tel: 020 7361 XXXX
Fax: 020 7361 2748