

DATED

2012

BETWEEN:-

(1)

AND

(2)SHROPSHIRE COUNCIL

**TEMPLATE ONLY – NOT FOR COMPLETION**

**PLANNING GAIN SITES INCORPORATING RENTED, SHARED OWNERSHIP AND  
DISCOUNTED SALE DWELLINGS**

**(Includes potential Viability & Overage Provisions)**

**AGREEMENT**

**Pursuant to Section 106 Town & Country Planning Act 1990**

**Relating to Land at**



LEGAL AND DEMOCRATIC SERVICES  
The Shirehall Abbey Foregate Shrewsbury SY2 6ND  
DX 702024 Shrewsbury 2

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**THIS AGREEMENT** is made the \_\_\_\_\_ day of \_\_\_\_\_ two thousand and twelve

**BETWEEN:-**

- (1) \_\_\_\_\_ (“the Landowner”); and
- (2) **SHROPSHIRE COUNCIL** of Shirehall, Abbey Foregate, Shrewsbury SY2 6ND (“the Council”).

**INTRODUCTION**

1. The Council is the local planning authority for the purposes of the Act for the area within which the Site is situated and accordingly is the person who is entitled to enforce the obligations contained in this Agreement.
2. The Landowner is the freehold owner of the Site which is registered at HM Land Registry under title number SL \_\_\_\_\_ free from encumbrances that would prevent the Landowner from entering into this Agreement.
3. The Landowner submitted the Application to the Council on \_\_\_\_\_ 20 \_\_\_\_\_ and pursuant to the Application the Landowner has applied for \_\_\_\_\_ planning permission for the Development.
4. The Council supports the Development subject to completion of this Agreement which makes provision for regulating the Development and securing the matters referred to in this Agreement.
5. The Council’s Planning Committee resolved at its meeting on \_\_\_\_\_ 20 \_\_\_\_\_ to grant the Planning Permission.
6. The parties have agreed to enter into this Agreement with the intention that the obligations contained in this Agreement may be enforced by the Council against the Landowner and their respective successors in title.

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

**OPERATIVE PART**

**1 DEFINITIONS**

For the purposes of this Agreement the following expressions shall have the following meanings:

“Act” Means the Town and Country Planning Act 1990 (as amended).

“Affordable Housing Dwellings”	Means Dwellings that will be made available for Occupation by eligible persons for either rental or low cost home ownership at less than market value in accordance with the definitions of tenure given by the Council in the Supplementary Planning Document.
“Affordable Housing Contribution”	Means the sum calculated in accordance with the Supplementary Planning Document listed in the Third Schedule of this Agreement and due to the Council to facilitate the delivery of additional affordable and/or supported housing within Shropshire.
“Affordable Rent Dwellings”	<p>Means the Affordable Housing Dwellings to be constructed pursuant to the Planning Permission and transferred to a Registered Provider for allocation as rented housing as prescribed in the Third Schedule to this Agreement.</p> <p>Lettings shall be made to persons under a form of tenancy permitted by the Homes and Communities Agency and at a rent (inclusive of applicable service charges) equal to or less than 80% of the open market rental value (or the maximum amount of local housing allowance payable for the Dwelling if this is lower).</p>
“Application”	Means a planning application made to the Council by the Landowner on for and allocated the reference xxxxxxxxxxxxxx by the Council.
“Choice Based Lettings System”	Means the Council’s system for advertising Affordable Housing Dwellings as being available for occupation.
“Commencement of Development”	Means the date upon which the Development shall be implemented by the carrying out on the Site pursuant to the Planning Permission of a material operation specified in Section 56 of the Act PROVIDED THAT any works of or associated with demolition, site clearance, remediation works, environmental or archaeological investigations, site and soil surveys, erection of contractors work compound, erection of site office, erection of fencing to site boundaries and laying out of access roads and services shall for the purposes of this Agreement be deemed not to be material operations and “Commencement Date” shall be construed accordingly.

“Development”	Means the Development of the Site in accordance with the Planning Permission.
“Discounted Rent Dwelling”	<p>Means the Affordable Housing Dwellings to be constructed pursuant to the Planning Permission and transferred to a Registered Provider by the Landowner for allocation in perpetuity as rented housing as prescribed in the Third Schedule to this Agreement.</p> <p>Lettings shall be made to persons under an assured shorthold tenancy and at a rent (inclusive of applicable service charges) that shall be no greater than 80% of the Market Rent for the Dwelling or the maximum amount of local housing allowance payable for the Dwelling (whichever is the lower).</p> <p>The maximum annual rent increase for the Dwelling will be Retail Price Index (RPI) + 0.5%. RPI will be taken as at September of the previous year (all items – percentage change over 12 months) as published by the Office of National Statistics (or any equivalent data source published by them or their successors in title).</p>
“Discounted Sale Dwelling”	Means an Affordable Housing Dwelling made available for freehold sale at the Formula Price and made available for Occupation as the occupiers only or principal home and in accordance with the terms prescribed in the Third Schedule to this Agreement.
“Dwelling”	Means a residential unit that may be built on the Site as part of the Development and reference to “Dwellings” shall be construed accordingly.
“Formula Price”	Means the sum which is sixty per cent (60%) of the Open Market Value of a Discounted Sale Dwelling.
“Gross Development Value”	Means the composite sum of development values as defined and determined in the Viability Appraisal and similar to that appended as the Sixth Schedule hereto.
“Homes and Communities Agency”	Means the Homes and Communities Agency (HCA) or the Tenant Services Authority or any other body undertaking the previous functions of the Housing Corporation under the Housing and Regeneration Act 2008.

“Housing Allocations Policy and Scheme”	Means the Council’s adopted policy and procedure for allocating Affordable Housing Dwellings to eligible persons from its housing waiting list.
“Interest”	Means interest at 4 per cent above the base lending rate of Barclays Bank plc from time to time.
“Local Lettings Plan”	Means a written agreement made between the Council and the Registered Provider that is permitted in accordance with the Housing Allocations Policy and Scheme and used to help promote a sustainable mix and balance of residents at the development.
“Market Rent”	Means the estimated amount for which the Dwelling should lease (let) on the date of valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm’s-length transaction after proper marketing wherein the parties had acted knowledgeably, prudently and without compulsion.
“Mortgagee in Possession”	Means a mortgagee of a Dwelling or the Site who has entered into possession of a Dwelling or the Site or who has appointed a receiver or administrative receiver under the security or has otherwise exercised its power of sale.
“Occupy/Occupation” and Occupied”	Means occupation for residential purposes but not including occupation by personnel engaged in construction, fitting out or decoration or occupation for marketing or display or occupation in relation to security operations.
“Open Market Value”	Means the price which the Dwelling would be expected to fetch on the open market by a willing vendor to a willing purchaser unfettered by the terms of this Agreement with that value being the average of no less than two written valuations obtained from two chartered surveyors or valuers accredited by the royal institution of chartered surveyors;
	or
	In the case of Shared Ownership Dwellings the price which the Dwelling would fetch on the open market by a willing vendor to a willing purchaser with that value being determined between the occupier and the

	Registered Provider in accordance with the provisions of the lease for such a Dwelling.
“Open Market Dwellings”	Means a Dwelling to be constructed on the Site pursuant to the Planning Permission and not made available for Occupation as an Affordable Housing Dwelling
“Overage”	Means any surplus profit for the Landowner over and above 20% of gross development value (as defined and determined in accordance with a Viability Appraisal) where a later variation to the Third Schedule of this Agreement has been agreed and executed by the Council upon request from the Landowner to make the Development Viable.
“Plan 1”	Means the plan attached to this Agreement marked “Plan 1”
“Planning Permission”	Means the planning permission that may be granted by the Council in pursuance of the Application as set out in the Second Schedule.
“Qualifying Purchaser”	Means a person who is resident within or employed within or has family connections within the administrative area of the Council who intends to purchase a Discounted Sale Dwelling and: <ol style="list-style-type: none"> <li>1. lacks his/her own housing or lives in housing which is agreed by the Council in its absolute discretion to be inadequate or unsuitable to meet his/her existing or future requirements whether because of its tenure size type design amenity location condition security or costs; and</li> <li>2. is unlikely to be able to meet his/her housing needs at the Development without access to an Affordable Housing Dwelling.</li> </ol>
“Qualifying Tenant”	Means a person who is resident within or employed within or has family connections within the administrative area of the Council who intends to rent a Discounted Sale Dwelling from the current occupier and: <ol style="list-style-type: none"> <li>1. lacks his/her own housing or lives in housing which is agreed by the Council in its absolute discretion to be inadequate or unsuitable to meet his/her existing or future requirements whether because of</li> </ol>

its tenure size type design amenity location condition security or costs; and

2. is unlikely to be able to meet his/her housing needs at the Development without access to an Affordable Housing Dwelling.

“Registered Provider”

Means a housing association or registered social landlord or other body registered with the Homes and Communities Agency (which shall include any successor in title) as a provider of affordable housing in accordance with the provisions of the Housing and Regeneration Act 2008.

“Restricted Staircasing”

Means the purchasing of a maximum of 80% of the equity interest in a Shared Ownership Dwelling from a Registered Provider pursuant to the terms of a Shared Ownership lease and or any other similar shared equity scheme.

“Sale Marketing Plan”

Means written evidence provided by the owner of a Discounted Sale Dwelling to the Council demonstrating to the Council’s reasonable satisfaction that it will actively be offered for sale to Qualifying Purchasers at the Formula Price.

“Secondary Purchaser”

Means any person who is not a Qualifying Purchaser.

“Shared Ownership Dwellings”

Means the Affordable Housing Dwellings to be constructed pursuant to the Planning Permission and transferred to a Registered Provider for allocation to persons as a form of low cost home ownership on a part buy/part rent basis in accordance with a form of lease permitted by the Homes and Communities Agency and on the terms prescribed in the Third Schedule to this Agreement.

“Shropshire Housing Partnership”

Means any Registered Provider or constituted community land trust or other housing provider or registered charity working with the Council to provide Affordable Housing Dwellings.

“Site”

Means the land described in the First Schedule.

“Social Rented Dwellings”

Means the Affordable Housing Dwellings to be constructed pursuant to the Planning



Permission and transferred to a Registered Provider for allocation to persons as rented housing as prescribed in the Third Schedule to this Agreement.

Lettings shall be made under an assured tenancy at a rent equal to or less than the prevailing target rent level (exclusive of applicable service charges) permitted by the Homes and Communities Agency through its national rent regime.

“Suitable Offer”

Means a written offer made by a Qualifying Purchaser or the Council or a member of the Shropshire Housing Partnership or a Secondary Purchaser to purchase a Discounted Sale Dwelling from the occupier at the Formula Price and in accordance with the terms prescribed in the Third Schedule to this Agreement.

“Supplementary Planning Document”

Means Shropshire Council’s Local Development Framework Supplementary Planning Document on the Type and Affordability of Housing (Adopted September 2012) or any subsequent modification or replacement thereof.

“Viability Appraisal”

Means an open-book financial viability appraisal of the Development funded by the Landowner and carried out in accordance with the provisions of the Supplementary Planning Document and in a form similar to that listed in the Fifth Schedule to this Agreement or otherwise as agreed in writing by the Council.

“Viable and Viability”

Means a percentage of profit on the gross development value for the Development determined by the Council as providing a competitive return for the Landowner after taking into account the covenants and obligations contained in the Third Schedule to this Agreement and the guidance on viability given in the Supplementary Planning Document.

Viability shall be determined following completion of the Viability Appraisal(s) for the Development (or revised Development where a later variation to the Third Schedule of this Agreement has been agreed and executed by the Council).

## **2 CONSTRUCTION OF THIS AGREEMENT**

- 2.1 Where in this Agreement 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 Agreement
- 2.2 Words importing the singular meaning where the context so admits include the plural meaning and vice versa
- 2.3 Words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, corporations and firms and all such words shall be construed interchangeable in that manner
- 2.4 Wherever there is more than one person named as a party and where more than one party undertakes an obligation all their obligations can be enforced against all of them jointly and against each individually unless there is an express provision otherwise
- 2.5 Any reference to an Act of Parliament shall include any modification, extension or re-enactment of that Act for the time being in force and shall include all instruments, orders, plans regulations, permissions and directions for the time being made, issued or given under that Act or deriving validity from it
- 2.6 references to any party to this Agreement shall include the successors in title to that party and to any deriving title through or under that party and in the case of the Council the successors to their respective statutory functions
- 2.7 the clause headings do not affect its interpretation;
- 2.8 references to the Site include any part of it;
- 2.9 "including" means "including, without limitation";
- 2.10 any covenant by the Landowner not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing;
- 2.11 if any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of this Agreement is to be unaffected;
- 2.12 The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it

## **3. LEGAL BASIS**

- 3.1 This Agreement is made pursuant to Section 106 of the Act
- 3.2 The covenants, restrictions and requirements imposed upon the Landowner under this Agreement create planning obligations pursuant to Section 106 of the Act and are enforceable by the Council against the Landowner

## **4 CONDITIONALITY**

- 4.1 This Agreement is conditional upon the Commencement of Development save for the provisions of Clauses 7.2, 13 and 14 which shall come into effect immediately upon completion of this Agreement

## **5 THE LANDOWNER'S COVENANTS**

- 5.1 The Landowner covenants with the Council as set out in the Third Schedule

## **6 THE COUNCIL'S COVENANTS**

- 6.1 The Council covenants with the Landowner as set out in the Fourth Schedule

## **7 MISCELLANEOUS**

- 7.1 The Landowner shall pay to the Council on completion of this Agreement the reasonable legal costs of the Council incurred in the negotiation, preparation and execution of this Agreement in the sum of [            ]
- 7.2 No provisions of this Agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999
- 7.3 This Agreement shall be registerable as a local land charge by the Council
- 7.4 Where the agreement, approval, consent or expression of satisfaction is required by the Landowner from the Council under the terms of this Agreement such agreement, approval or consent or expression of satisfaction shall not be unreasonably withheld or delayed and any such agreement, consent approval or expression of satisfaction shall be given on behalf of the Council by the Planning Manager or the Housing and Enabling Manager (or their nominated representatives) and any notices shall be deemed to have been properly served if sent by recorded delivery to the principal address or registered office (as appropriate) of the relevant party
- 7.5 Following the performance and satisfaction of all the obligations contained in this Agreement the Council shall forthwith effect the cancellation of all entries made in the Register of Local Land Charges in respect of this Agreement
- 7.6 Insofar as any clause or clauses of this Agreement 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 Agreement
- 7.7 This Agreement shall cease to have effect (insofar only as it has not already been complied with) if the Planning Permission shall be quashed, revoked or otherwise withdrawn or (without the consent of the Landowner) it is modified by any statutory procedure or expires prior to the Commencement of Development
- 7.8 No person shall be liable for any breach of any of the planning obligations or other provisions of this Agreement after it shall have parted with its entire interest in the Site or any part thereof but without prejudice to liability for any subsisting breach arising prior to parting with such interest. Neither the reservation of any rights or the inclusion of any covenants or restrictions over the Site in any transfer of the site will constitute the retention of an interest for the purposes of this paragraph
- 7.9 Subject to the provisions of paragraph 2 of the Third Schedule the obligations contained in this Agreement shall not be binding upon or enforceable against owner-occupiers or tenants of the Open Market Dwellings constructed pursuant to the Planning Permission nor against those deriving title from them
- 7.10 The obligations contained in this Agreement shall not be binding upon or enforceable against any statutory undertaker or any person who acquires part of the Site or any interest in it for the purposes of the supply of electricity gas water drainage telecommunications or public transport services

- 7.11 Nothing in this Agreement shall prohibit or limit the right to develop any part of the Site in accordance with a planning permission (other than the Planning Permission) granted (whether or not on appeal) after the date of this Agreement

## **8 MORTGAGEE EXEMPTION CLAUSES**

- 8.1 It is hereby agreed and declared between the parties that the covenants contained in this Agreement relating to affordable housing shall not be binding on a mortgagee or charge in possession of the Open Market Dwellings on the Site or a receiver or appointed by such mortgagee or chargee or a bona fide purchaser for value thereof from such a mortgagee or chargee in possession or receiver appointed (except in the case of a purchaser which is a Registered Provider) or the successors in title of such purchaser with the intent that the clauses in this Agreement relating to affordable housing shall cease to bind the Open Market Dwellings on the Site in perpetuity

- 8.2 It is further agreed and declared between the parties that the covenants contained in this Agreement shall not be binding on a mortgagee or chargee in possession of the Affordable Housing Dwellings on the Site or a receiver appointed by such mortgagee or chargee or a bona fide purchaser for value thereof from such a mortgagee or chargee in possession or receiver appointed (except in the case of a purchaser which is a Registered Provider) or the successors in title of such purchaser with the intent that the clauses in this Agreement shall cease to bind Affordable Housing Dwellings on the Site in perpetuity PROVIDED that:-

- (i) such a mortgagee or chargee in possession or receiver appointed exercising any power of sale or leasing shall first use all reasonable endeavours over a period of three months to dispose of the Affordable Housing Dwellings on the Site to a Registered Provider and which Registered Provider shall covenant with the Council in accordance with the clauses in this Agreement that the said mortgagee or chargee or receiver shall as consideration for such disposal always be entitled to the greater of the sums as set out in (ii) below
- (ii) if any such mortgagee or chargee or receiver is unable within the said period of three months to dispose of the Affordable Housing Dwellings on the Site in accordance with sub clause (i) above they shall next have given notice to the Council offering to transfer the Affordable Housing Dwellings on the Site to the Council at a consideration representing either the open market value thereof (being the value of the Affordable Housing Dwellings unencumbered by this Agreement) at the date of the notice subject to any leases or tenancies then subsisting and as if the clauses in this Agreement were not still in force the amount of such consideration to be agreed between the Council and the mortgagee or chargee or receiver and failing such agreement to be determined by a Member of the Royal Institution of Chartered Surveyors acting as an expert and not as an arbitrator to be appointed by joint agreement of the parties (the costs of his appointment and acting to be met by the parties in equal shares) or the sum outstanding under any mortgages on the Affordable Housing Dwellings whichever shall be the greater AND either
  - (a) the Council shall within 42 days of receipt of the notice given by the mortgagee or chargee or receiver have given notice in writing that it does not wish to acquire the Affordable Housing Dwellings on the Site or shall have failed to respond to such notice; or

- (b) if the Council has served notice on the mortgagee or chargee or receiver pursuant to (a) above and it shall have failed to complete the transfer of the Affordable Housing Dwellings on the Site within eight weeks of the price having been agreed between the Council and the mortgagee or chargee or receiver or, in the absence of such agreement, within eight weeks of the price having been determined by the said expert

## **8.2 Shared Ownership Mortgagee Exemption**

- 8.2.1 It is agreed between the parties that in the event that a mortgagee or a chargee of a Dwelling that is occupied on the basis of a Shared Ownership Lease takes possession of the said Dwelling from the Leaseholder (“the Leaseholder”) then, under this Agreement that said mortgagee or chargee must comply with the following procedures;
- 8.2.2 It shall give notice in writing to the Chief Executive of the Registered Provider or to any other Registered Provider that it may have transferred the Site or Dwellings of its possession and shall offer to dispose of the leasehold interest in the Dwelling at the price of the consideration of the equity share paid by the Leaseholder or the sum outstanding under any mortgage or charge on the Dwelling whichever is the greater (“the Offer”)
- 8.2.3 The Registered Provider shall within twenty working days of receipt of the Offer notify the mortgagee or chargee of its decision either to accept the Offer or to decline it
- 8.2.4 If the Registered Provider decides to accept the Offer it shall complete the transfer of the leasehold interest in the Dwelling within thirty working days of the Offer acceptance and shall following completion of the transfer of the Dwelling pursuant to this sub-clause remarket the Dwelling in accordance with this Agreement to another purchaser
- 8.2.5 In the event that the Registered Provider shall decline the Offer the mortgagee or chargee shall give notice in writing to the Planning and Corporate Policy Manager of the Council of its intention to sell to it on the basis of the Offer in 8.2.2
- 8.2.6 The Council shall within twenty working days of the Notice notify in writing the mortgagee or chargee of its intention to either accept or decline the Offer
- 8.2.7 If the Registered Provider decides to accept the Offer it shall complete the transfer of the leasehold interest in the Dwelling within thirty working days of the Offer acceptance
- 8.2.8 In the event that the Council declines the Offer the mortgagee or chargee shall be free to market and dispose of the leasehold interest in the Dwelling subject to the provisions in this Agreement as it relates to the Shared Ownership Dwellings
- 8.2.9 In the event that the mortgagee or chargee shall dispose of the leasehold interest in the Dwelling in accordance with the provisions of clause 8.2.8 it shall apply the proceeds of sale in the following order:-
- (i) to itself to satisfy the amount owing under its mortgage or charge;
  - (ii) to the Registered Provider in respect of any sums properly due under the lease;
  - (iii) to apply any further sums in accordance with the mortgagee or chargee’s statutory obligations.

### **8.3 Discounted Sale Mortgagee Exemption**

- 8.3.1 A Mortgagee in Possession of a Discounted Sale Dwelling shall not sell it other than as provided for within sub-clauses 8.3.2 and 8.3.3 of this Agreement
- 8.3.2 The Mortgagee in Possession shall be free to sell the Discounted Sale Dwelling to any purchaser PROVIDED THAT the sale price shall be no more than the Formula Price or the sum necessary to recoup all of the mortgage debt and costs (whichever shall be the higher) unless the sale is pursuant to sub-clause 8.3.3 of this Agreement
- 8.3.3 If after a period of eight weeks from taking possession of the Discounted Sale Dwelling (with notice in writing having been sent by recorded signed for post to the Council by the Mortgagee in Possession on the commencement of that period or as soon as possible thereafter) it has not been sold or is not subject to a formal exchange of contracts pursuant to a sale in accordance with sub-clause 8.3.2 of this Agreement the Mortgagee in Possession shall be entitled to sell the Dwelling to any purchaser at Open Market Value and free from the restrictions contained in this Agreement
- 8.3.4 Where the Mortgagee in Possession sells the Discounted Sale Dwelling pursuant to sub-clause 8.3.3 of this Agreement it shall (after recouping all of the mortgage debt and costs) pay to the Council all of the difference between the sale price and the Formula Price (subject to the sale price exceeding the Formula Price) which sum the Council shall use to facilitate the provision of additional Affordable Housing Dwellings
- 8.3.5 Following completion of a sale by the Mortgagee in Possession pursuant to sub-clause 8.3.3 of this Agreement the Council shall within two weeks remove the provisions of this Agreement as they relate to the Dwelling from the local land charges register and also consent to removal of the land registry title Restriction

### **9. WAIVER**

- 9.1 No waiver (whether express or implied) by the Council or Landowner of any breach or default in performing or observing any of the covenants terms or conditions of this Agreement shall constitute a continuing waiver and no such waiver shall prevent the Council or Landowner from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default

### **10. CHANGE IN OWNERSHIP**

- 10.1 The Landowner agrees with the Council to give to the Council as soon as practicably possible written notice of any change in ownership of any of its interests in the Site occurring before all the obligations under this Agreement have been discharged such notice to give details of the transferee's full name and registered office (if a company or usual address if not) together with the area of the Site by reference to a plan

### **11. INTEREST**

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

### **12. VAT**

- 12.1 All consideration given in accordance with the terms of this Agreement shall be exclusive of any value added tax properly payable

### **13. JURISDICTION**

- 13.1 This Agreement is governed by and interpreted in accordance with the law of England and Wales

**14. DELIVERY**

- 14.1 The provisions of this Agreement (other than this clause which shall be of immediate effect) shall be of no effect until this Agreement has been dated

**15. DISPUTE RESOLUTION**

- 15.1 In the event of any dispute or difference arising out of this Agreement between the parties (other than a dispute or difference relating to a matter of law or concerning the meaning or construction of this Agreement) such dispute or difference shall be referred to a person to be agreed between the parties who is a member of the Royal Institute of Chartered Surveyors or in the absence of agreement on the application of any party to be appointed by the President of the Royal Institute of Chartered Surveyors such person to act as sole expert in the determination of the dispute or difference and whose decision shall be final and binding upon the parties

Executed as a Deed on the date specified at the commencement of this Agreement

DRAFT SECTION 106 AGREEMENT

## FIRST SCHEDULE

### Details of the Landowner's Title, and description of the Site

ALL THAT freehold land situate at \_\_\_\_\_ as the  
same is registered with absolute title at HM Land Registry under title number SL  
and which is shown edged red on Plan 1:

DRAFT SECTION 106 AGREEMENT



## **SECOND SCHEDULE**

### **Form of notice of planning permission**

Planning Permission reference / / in the form annexed hereto issued pursuant to the Application.

DRAFT SECTION 106 AGREEMENT

## THIRD SCHEDULE

### The Landowner's covenants with the Council

#### 1. Transfer of amenity space

1.1 The Landowner covenants with the Council that:

1.1.1 Prior to the Occupation of the Dwelling to be constructed on the Site pursuant to the Application to have laid out, equipped and made available for use the local area of play in accordance with a scheme approved in writing by the Council.

#### 2. Affordable Housing Dwellings

2.1 The Landowner covenants with the Council that prior to Commencement of Development it will submit to the Council for approval a provisional scheme for the phasing of the Development on the Site or a statement that the development of the Site is to be completed in one phase PROVIDED ALWAYS THAT the provisional scheme may be amended by the Landowner from time to time and any amended scheme which has been approved by the Council (such approval not to be unreasonably withheld or delayed) shall from the date of that approval constitute the phasing scheme for the purpose of this clause 2.1 AND PROVIDED THAT if the provisional scheme is not approved by the Council within 20 working days of submission to them for approval (with a letter referring to the Application, this Deed and the consequences of this provision) then it shall be deemed approved

2.2 The Landowner covenants with the Council that prior to the Commencement Date of each phase Development identified pursuant to clause 2.1 of this Schedule it shall submit to the Council written confirmation of the agreed Affordable Housing Dwelling tenures Dwelling types and bedspace numbers on a plot by plot basis for the phase identified

2.2 The Landowner covenants with the Council that not less than xxxx (13%) of the total number of Dwellings that will have been constructed on the Site pursuant to the Planning Permission by completion of the phase or phases will be Affordable Housing Dwellings. The transfer of those Dwellings that are to be Affordable Rent Dwellings and/or Social Rent Dwellings and/or Discounted Rent Dwellings and/or Shared Ownership Dwellings pursuant to paragraphs 2.5 and 2.7 of this Schedule and the marketing of those Dwellings that are to be made available as Discounted Sale Dwellings pursuant to paragraph 2.9 of this Schedule shall be triggered by the Occupation of 50% of the Dwellings to be constructed on each phase of the Development.

2.3 The Landowner covenants with the Council that the Affordable Housing Dwellings shall be made available as xxxx (70%) either Affordable Rent Dwellings or Social Rent Dwellings or Discounted Rent Dwellings and xxxx (30%) either Shared Ownership Dwellings or Discounted Sale Dwellings (or such other Affordable Housing Dwelling tenure type and mix as the Council may approve in writing) to be Occupied by in accordance with the provisions set out in the following clauses 2.5 to 2.9 (inclusive) to this Schedule.

Affordable Rent Dwellings and Social Rent Dwellings and Discounted Rent Dwellings

- 2.4 (Save in the case where it is a Registered Provider) the Landowner shall transfer each of the Affordable Housing Dwellings to a Registered Provider to be made available for Occupation as rented affordable housing
- 2.5 The Landowner covenants with the Council as follows:-
- 2.5.1 Not to permit the occupation of any of the Affordable Rent Dwellings and/or Social Rent Dwellings and/or Discounted Rent Dwellings other than strictly in accordance with the procedures set out in the following sub-clauses 2.6.2 to 2.6.4 (inclusive) of this Schedule
- 2.5.2 The Affordable Housing Dwellings referred to in sub-clause 2.6.1 of this Schedule shall at all times be allocated in accordance with the Council's adopted Housing Allocations Policy and Scheme and advertised as available for Occupation through its preferred Choice Based Lettings System (such policy and scheme and system may be amended and adopted from time to time by the Council upon prior notification to the Registered Provider)
- 2.5.3 The Affordable Housing Dwellings referred to in sub-clause 2.6.1 of this Schedule shall at all times be managed in accordance with such published policies and procedures as may be adopted from time to time by the Registered Provider
- 2.5.4 The Affordable Housing Dwellings referred to in sub-clause 2.6.1 of this Schedule shall at all times be allocated and managed in accordance with the requirements of sub-clauses 2.6.2 and 2.6.3 (inclusive) of this Schedule together with the requirements of any Local Lettings Plan agreed in writing by the Council in operation at that particular time

#### Shared Ownership Dwellings

- 2.6 (Save in the case where it is a Registered Provider) the Landowner shall transfer each of the Shared Ownership Dwellings to a Registered Provider to be made available for Occupation under this form of low cost home ownership
- 2.7 The Landowner covenants with the Council as follows:-
- 2.7.1 Shared Ownership vacancies made available by the Registered Provider shall be advertised through the Council's preferred Choice Based Lettings System and in accordance with the requirements of the Council's adopted Housing Allocations Policy and Scheme (such policy and scheme and system may be amended and adopted from time to time by the Council upon prior notification to the Registered Provider) and provisions of any Local Lettings Plan agreed in writing by the Council in operation at that particular time
- 2.7.2 Not to permit the Occupation of any of the Shared Ownership Dwellings otherwise than by a person who has acquired an interest in that Dwelling in accordance with the procedures set out in clause 2.8 of this Schedule save for the circumstances detailed in clause 2.8.7 of this Schedule.
- 2.7.3 The Shared Ownership Dwellings shall be marketed for acquisition on the basis of a purchase price of at least 25% of the Open Market Value with a rent payable to the Registered Provider by the occupier of no more than 2.75% of the retained equity at the Open Market Value.

- 2.7.4 The occupier of a Shared Ownership Dwelling shall have the right to increase his ownership share in the Dwelling by purchasing additional equity over time at a price reflecting the Open Market Value of the share being acquired at the date of acquisition BUT SUBJECT TO a maximum of 80% equity ownership through Restricted Staircasing
- 2.7.5 The occupier of a Shared Ownership Dwelling shall not dispose of their interest in it nor offer so to do until they have first offered it in writing at the applicable share of Open Market Value to the Registered Provider who within six weeks of service of any such offer must serve written notice on the said occupier either:-
- a) declining the offer; or
  - b) stating that it will accept the offer; or
  - c) declining the offer but nominating an alternative purchaser(s)
- 2.7.6 The acceptance by the Registered Provider of an offer made under sub-clause 2.8.5 (b) or (c) of this Schedule shall be on the following terms:-
- a) the amount payable in respect of the occupier's interest in the Shared Ownership Dwelling shall be the applicable share of Open Market Value; and
  - b) any purchaser(s) nominated by the Registered Provider under sub-clause 2.8.5(c) of this Schedule shall have satisfied the requirements of any Local Lettings Plan agreed in writing by the Council in operation at that particular time
- 2.7.7 If the Registered Provider does not serve a notice upon the occupier within the six week period specified in clause 2.8.5 of this Schedule or if the Registered Provider serves a notice in accordance with the provisions of clause 2.8.5(a) of this Schedule then the occupier may dispose of its interest in the relevant Shared Ownership Dwelling at the applicable equity share of Open Market Value but otherwise free from any occupancy restrictions and advertised as available for sale in any manner the occupier considers appropriate

#### Discounted Sale Dwellings

- 2.9 The Landowner covenants with the Council to provide a Sale Marketing Plan demonstrating that the Discounted Sale Dwellings will be offered for sale to Qualifying Purchasers at no more than the Formula Price for Occupation under this form of low cost home ownership and to dispose of them strictly in accordance with the provisions set out in the following sub-clauses 2.9.3 to 2.9.13 (inclusive) of this Schedule SAVE THAT in the case of the initial sale of a Discounted Sale Dwelling references to the occupier in those sub-clauses shall be taken to also mean the Landowner
- 2.9.1 The occupier of a Discounted Sale dwelling covenants with the Council as follows:-
- 2.9.2 The occupier of a Discounted Sale Dwelling shall not let it (or offer so to do) other than to a Qualifying Tenant under a shorthold tenancy and at the same level of rent as would be applicable to a Discounted Rent Dwelling

- 2.9.3 The occupier of a Discounted Sale Dwelling shall not sell it (or offer so to do) other than in accordance with an agreed Sale Marketing Plan at the Formula Price and to a Qualifying Purchaser (or to the Council or to a body nominated by the Council from the Shropshire Housing Partnership) pursuant to sub-clause 2.9.6 of this Schedule or otherwise to a Secondary Purchaser pursuant to sub-clause 2.9.9 of this Schedule
- 2.9.4 Before being permitted to market the Discounted Sale Dwelling the occupier shall first provide the Council with a Sale Marketing Plan evidencing the Formula Price and stating the actions to be taken to advertise the Dwelling for sale to Qualifying Purchasers and such a document shall serve as formal written notice to the Council of the occupiers intention to sell the Dwelling
- 2.9.5 The Council shall within two weeks of receipt of a complete Sale Marketing Plan grant written consent to the occupier (or be deemed to have granted the same) for marketing to commence in accordance with the information given in that document
- 2.9.6 For a period of twelve weeks from receipt of the Council's written consent under sub-clause 2.9.5 of this Schedule only Qualifying Purchasers (or to the Council or to a body nominated by the Council from the Shropshire Housing Partnership) shall be permitted to make a Suitable Offer and enter into terms with the occupier to purchase the Discounted Sale Dwelling in accordance sub-clause 2.9.7 of this Schedule
- 2.9.7 Any sale of the Discounted Sale Dwelling under sub-clauses 2.9.6 or 2.9.9 of this Schedule shall be on the following terms:-
- (i) the purchaser shall make a Suitable Offer to the occupier which shall be no more than the Formula Price;
  - (ii) the purchaser shall covenant with the Council to observe and perform the obligations set out in sub-clauses 2.9.1 to 2.9.13 (inclusive) of this Third schedule;
  - (iii) the Dwelling shall be sold with vacant possession;
  - (iv) the sale shall be subject to the formal exchange of contracts within four weeks of the Suitable Offer being made with a completion date being no more than four weeks thereafter (or such other date for completion as may be agreed as binding between the parties); and
  - (v) the contract for sale shall be subject to the edition of the Standard Conditions of Sale current at the date of the Suitable Offer
- 2.9.8 In the event that the Discounted Sale Dwelling is purchased by the Council or by a nominated member of the Shropshire Housing Partnership such a purchaser may at its absolute discretion sell the Dwelling in accordance with the provisions of this Schedule or retain it for use as either a Discounted Rent Dwelling or a Shared Ownership Dwelling
- 2.9.9 If after a period of twelve weeks from receipt of the Council's written consent under sub-clause 2.9.5 of this Schedule the Discounted Sale Dwelling has not been sold or is not subject to a formal exchange of contracts pursuant to a sale in accordance with sub-clause 2.9.6 of this Schedule the occupier shall be entitled to sell the Dwelling to a Secondary Purchaser in accordance with sub-clause 2.9.7 of this Schedule

2.9.10 A Secondary Purchaser shall only be permitted to make a Suitable Offer and enter into terms with the occupier to purchase the Discounted Sale Dwelling pursuant to the provisions of sub-clause 2.9.9 of this Schedule

2.9.11 No freehold interest in any Discounted Sale Dwelling shall be transferred by the occupier to any purchaser other than subject to a covenant that:

“No disposition or sale to a third party within 80 years from the date of Commencement of Development shall take place at a price exceeding the Formula Price, as defined in an Agreement made under section 106 of the Town and Country Planning Act 1990 on [ ] between (1) of and (2) Shropshire Council as certified by a Chartered Surveyor of not less than 10 years standing the evidence of which shall be provided to the Council”; and

2.9.12 Each purchaser of a Discounted Sale Dwelling shall:

within seven days of completion of the purchase apply to register this Agreement in the Charges Register of the Land Registry Title relating to that Discounted Sale Dwelling and to register the following Restriction in the Proprietorship Register of the title:-

“No disposition of the registered estate by the proprietor of the registered estate shall be registered without the written consent signed by Shropshire Council of Shirehall, Abbey Foregate, Shrewsbury, Shropshire SY2 6ND” (the “Restriction”); and

provide to the Council as soon as is reasonably possible a copy of the Land Registry Title following completion of the registration referred to in this clause

2.9.13 Provisions for a Mortgagee in Possession of a Discounted Sale Dwelling to dispose of their interest in that Dwelling are prescribed in clause 8.3 of this Agreement

### **3 Affordable Housing Contribution**

3.1 The Affordable Housing Contribution comprises financial amounts due in lieu of part-dwellings and/or the outcome of other negotiations between the Council and the Landowner in respect of further commuted sum payments

3.2 The Landowner covenants with the Council that it shall pay the sum of £ to the Council as the Affordable Housing Contribution prior to the Commencement of Development

### **3 Viability Appraisal**

The Landowner acknowledges and covenants with the Council that:-

4.1 In accordance with the Council's Supplementary Planning Document 13% of the Dwellings to be constructed on the Site pursuant to a planning permission should be Affordable Housing Dwellings with 70% of that provision being made available as Affordable Rent Dwellings or Social Rent Dwellings or Discounted Rent Dwellings and 30% of that provision being made available as Shared Ownership Dwellings or Discounted Sale Dwellings

- 4.2 The Planning Permission requires the provision of xxxx Dwellings as Affordable Housing Dwellings made available as xxxx Affordable Rent Dwellings or Social Rent Dwellings or Discounted Rent Dwellings and xxxx Shared Ownership Dwellings or Discounted Sale Dwellings which together are deemed as having an equivalent financial value to the sum of £ (taken as the gross development value of the Affordable Housing Dwellings as a whole determined by the Viability Appraisal)
- 4.3 The Planning Permission also requires the sum of £ to be paid to the council as the Affordable Housing Contribution
- 4.4 The Planning Permission also requires the sum of £ to be paid to the council as the Community Infrastructure Levy
- 4.5 Where the Landowner contends that provision of the full number and specified size and tenure mix of Affordable Housing Dwellings and/or payment of the full amount of any of the financial contributions due to the Council in accordance with the requirements of clauses 4.2 to 4.4 (inclusive) of this Schedule cannot be made because it does not generate a competitive financial return for the Landowner the Council may agree that an open-book financial assessment of the Development be carried out at the Landowner's cost
- 4.6 The financial assessment carried out in accordance with clause 4.5 of this Schedule will take the form of the Viability Appraisal template annexed as the Fifth Schedule hereto (or any other form of Viability Appraisal that may be agreed in writing between the Landowner and the Council) PROVIDED THAT there is an open book accounting approach demonstrating that the land value and the development costs and the development values and the finance costs are all reflective of current market conditions together with all of the applicable obligations specified within the Supplementary Planning Document
- 4.7 The findings of any Viability Appraisal(s) carried out in respect of the Development shall only remain valid for a maximum period of 12 months and large developments with either phased reserved matters or a phased construction and sales programmes in excess of 12 months may be assessed for Viability at each phase of Development
- 4.8 The Viability Appraisal(s) shall be facilitated by the Landowner acting reasonably and in good faith by fully disclosing and justifying all capital costs and revenue items for the Development and making all itemised capital costs and revenue items available on request to the Council for the purpose of compliance checking by an audit process of the Council's choosing
- 4.9 Where the Viability Appraisal demonstrates to the reasonable satisfaction of the Council that the Development is not Viable the Council may consent to the Landowner seeking to negotiate a reduction or alteration in such obligations and/or contributions as may be required to make the Development Viable for the Landowner in the reasonable opinion of the Council PROVIDED THAT in the reasonable opinion of the Council the criteria referred to in clause 4.10 of this Schedule have also been considered and satisfied
- 4.10 In addition to financial Viability the Council shall also have consideration for the wider contextual and strategic relevance issues described in the Supplementary Planning Document when determining whether or not to agree to any reduction or alteration in the obligations and/or contributions requested by the Landowner in accordance with clause 4.9 of this Schedule

- 4.11 Any agreement by the Council to a reduction or alteration in the obligations and/or contributions requested by the Landowner to make the Development Viable shall be given in writing as a deed of variation to this Third Schedule and include provisions for a further Viability Appraisal to be carried out upon completion of either the revised Development or revised phase together with recovery from the Landowner of any subsequent Overage arising from such a variation
- 4.12 When all of the Dwellings in the revised Development or phase have been sold or let, a calculation to determine Overage shall apply to any profit made by the Landowner over and above 20% of the gross development value of the revised Development or phase the excess sum shall be due from the Landowner to the Council and paid as an additional Affordable Housing Contribution
- 4.13 For the avoidance of doubt any Overage due to the Council by the Landowner pursuant to clause 4.12 of this Schedule shall not exceed the total value of the original obligations and contributions for the Development required by the Council from the Landowner in accordance with clauses 4.2 to 4.4 (inclusive) of this Schedule prior to any subsequent variation thereof

## **5. Overage**

- 5.1 Where the Council grants a variation to this Third Schedule pursuant to clause 4.11 of this Schedule there will also be a requirement to undertake a further Viability Appraisal at the Landowner's cost upon completion of either the revised Development or revised phase to determine if there is any surplus profit for the Landowner as Overage above 20% of gross development value
- 5.2 The further Viability Appraisal shall be facilitated by the Landowner acting reasonably and in good faith by fully disclosing and justifying all capital costs and revenue items for the revised Development and making all itemised capital costs and revenue items available on request to the Council for the purpose of compliance checking by an audit process of the Council's choosing
- 5.4 Where the further Viability Appraisal demonstrates to the reasonable satisfaction of the Council that there is such surplus profit as referred to in clause 4.12 of this Schedule in respect of the revised Development or phase this Overage shall be paid to the Council by the Landowner within 28 days of written request by the Council PROVIDED THAT at all times the provisions of clause 4.13 of this Schedule shall remain in full force and effect



## **FOURTH SCHEDULE**

### **The Council's Covenants**

#### **Issue of Planning Permission**

1. The Council hereby covenants with the Landowner that it shall issue the Planning Permission within 14 days of the date of this Agreement

#### **Discharge of obligations**

2. At the written request of the Landowner the Council shall provide written confirmation of the discharge of the obligations contained in this Deed when satisfied that such obligations have been performed

#### **Repayment of Contributions**

3. The Council covenants with the Landowner that if after a period of 10 years from the date of receipt of the final instalment of the Affordable Housing Contribution, it, or any part thereof, remains unspent or unallocated it shall repay such unspent or unallocated sum to the party that initially made the payment to the Council

#### **Use of Contributions**

4. The Council covenants with the Landowner that it shall use the Affordable Housing Contribution to facilitate the provision of additional affordable and/or supported housing within the administrative area of the Council



GROSS DEVELOPMENT VALUE				
Open Market Units :-				
Unit Type	Floor Area	Number	Actual or Anticipated Sales Value	
	sq m			
	sq m			
	sq m			
	sq m			
	sq m			
	sq m			
Sub-total	sq m			£
Affordable Units :-				
Unit Type	Floor Area	Tenure	Number	Actual or Anticipated Sales Value
	sq m			
	sq m			
	sq m			
	sq m			
Sub-total	sq m			£
TOTAL GROSS DEVELOPMENT VALUE				

TOTAL DEVELOPMENT COSTS				
Construction :-			Rate	Total
<b>A</b>	<b>Construction</b>	£	per sq m	
<b>B</b>	<b>Roads and Services</b>	£	lump sum	
<b>C</b>	<b>Landscaping</b>	£	lump sum	
<b>D</b>	<b>Abnormal costs (please specify)</b>	£	lump sum	
<b>E</b>	<b>Other (please specify)</b>	£	lump sum	
<b>F</b>	A to E Sub-total			
<b>G</b>	<b>Construction Contingency</b>	___%	of F	
<b>H</b>	TOTAL CONSTRUCTION COSTS (A to G)			£
Fees :-			Rate	Total
<b>J</b>	<b>Professional Fees</b>	___%	of H	
<b>K</b>	<b>Project Management</b>	___%	of H	
<b>L</b>	<b>Marketing &amp; Advertising</b>	£	lump sum	
<b>M</b>	<b>Planning &amp; Feasibility Fees</b>	£	lump sum	
<b>N</b>	<b>Legal Fees on Sales / Lettings</b>	___%	of GDV	
<b>P</b>	<b>Agents Fees on Sales / Lettings</b>	___%	of GDV	
<b>R</b>	<b>Land Acquisition Cost</b>	£	lump sum	
<b>S</b>	<b>Land Acquisition Fees</b>	___%	of R	
<b>T</b>	<b>S106 (off-site contributions)</b>	£	lump sum	
TOTAL DEVELOPMENT COSTS				£

COST OF BANK FINANCE		
Interest Rate	%	(actual likely to be paid now)
Development Period		(Years)
Total Development Costs (TDC)	£	(Total from Page 1)
Interest Rate Multiplier (IRM)		$\{[(1 + \text{Interest Rate expressed as a fraction})^{\text{number of yrs}} - 1] \times 0.5\}$ ie. $[(1 + \text{IR})^Y - 1] \times 0.5$
Total Interest (TDC multiplied by IRM)		£
Other Bank Lending/Arrangement Fees		£
TOTAL FINANCE COST		£

DEVELOPMENT SURPLUS / LOSS			
	Money In	Money Out	
GDV			
Total Development Costs			
Total Finance Cost			
TOTAL SCHEME SURPLUS OR LOSS			£
Expressed as a % of Gross Development Value			%

Executed as a Deed on the date specified at the commencement of this Agreement

THE COMMON SEAL OF )  
 )  
was affixed in the presence of:- )

Authorised Signatory

The **COMMON SEAL** of )  
**SHROPSHIRE COUNCIL** )  
was hereunto affixed )  
in the presence of:- )

Authorised Signatory

DRAFT SECTION 106 AGREEMENT