

Our Ref: KG/KLW/TOWNCOUNCIL/MISC

Your Ref:

Date: 14 November 2016

Please reply to the Liskeard Office

Steve Vinson
Town Clerk
Liskeard Town Council
3 West Street
Liskeard
Cornwall
PL14 6BW

Dear Steve

Land off Eastern Avenue

Thank you for your recent email.

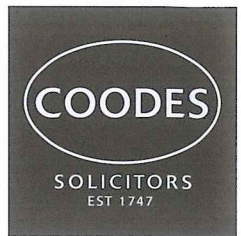
I enclose a copy of the latest Overage Deed together with a copy of my response.

The Solicitor acting for Windmill Investments Limited changed the whole procedure by introducing the requirement to agree the Overage Payment even before the Trigger Date. I cannot see how it would be possible to agree an Overage Payment prior to the actual Trigger Date taking place. A compromise has been reached whereby on the Trigger Date the Council will pay half the estimated costs of the anticipated Overage Payment if this is not agreed prior to the trigger date and then it will be referred for determination when the balance will be due.

My other concern is with the restriction that they are registering on the title to protect the Overage. I previously amended the restriction so that it was any Conveyancer could certify that on a transfer of the property the Transferee has signed a covenant in favour of the Company and therefore the Conveyancer can give the certificate required.

However, if the Certificate has to be signed by the Beneficiary or by the Company then there could be problems if in say 20 years time you cannot find or locate an Officer of the Company or a successor in title to the benefit of the Overage. In those circumstances it would make the property impossible to sell as you could not possibly register a restriction at the Land Registry. This is the reason why I have requested the amendments and the word "beneficiary" has recently been re-introduced into the restriction which causes concern for the reasons previously given.

Once these points are agreed then we can deal with the finalisation of the paperwork.



www.coodes.co.uk

Registered Office

Elizabeth House
Castle Street
Truro
TR1 3AP

DX 81202 Truro
t 01872 246200
f 01872 241122

St Austell Business Park
St Austell
Cornwall
PL25 4FD

DX 81250 St Austell
t 01726 874700
f 01726 874799

6 Cheltenham Place
Newquay
TR7 1DQ

DX 81953 Newquay
t 01637 878111
f 01637 874732

10 Windsor Place
Liskeard
PL14 4BH

DX 81653 Liskeard
t 01579 347600
f 01579 347947

8 Race Hill
Launceston
PL15 9BA

DX 82700 Launceston
t 01566 770000
f 01566 770001

49-50 Morrab Road
Penzance
TR18 4EX

DX 81305 Penzance
t 01736 362294
f 01736 363533

4 Bodmin Street
Holsworthy
EX22 6BB

DX 118657 Holsworthy
t 01409 253425
f 01409 253439

The Guildhall
Street-an-Pol
St Ives
Cornwall
TR26 2DS

DX 81801 St Ives
t 01736 339333
f 01736 797926

Gwella House
6B Falmouth Business Park
Bickland Water Road
Falmouth
TR11 4SZ

DX 81169 Falmouth
t 01326 318900
f 01326 311275



Richard Pollock
Sarah Cornish
Nick Latimer
Louise Southwell

Cont'd

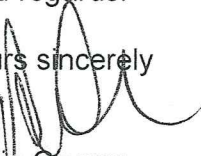
14 November 2016

It may well be that if they are going to insist on the restriction remaining as worded the Council will need to just make a decision as to whether they are willing to take that risk.

I also think there is also some confusion about Permitted Disposal and I have raised this point with them.

Kind regards.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kevin George', with a stylized flourish at the end.

Kevin George
For Coodes LLP

Direct Dial: 01579 324003

Email: kevin.george@coodes.co.uk

Please reply to the Liskeard Office

Enc

Our Ref: KG/KLW/TOWNCOUNCIL/28263/27
Your Ref: FAO – Simon Rhodes
Date: 14 November 2016

Please reply to the Liskeard Office

Shulmans LLP
DX: 729700 Leeds 69

BY EMAIL ONLY TO – srhodes@shulmans.co.uk

Dear Simon

Land off Eastern Avenue

Thank you for your email of the 7th November with revised Overage Deed. I note you have now provided for a half of the estimated sum to be paid on the Trigger Date in the event there is no agreement with the exception of Trigger Date 2 for some reason. I have already made it clear that it is not going to be possible for the Council to process payments quickly within the anticipated timescale you have suggested of two working days. It has to be a realistic time period.

I also note you have amended clause 7.2 and introduced the fact that it is the beneficiary who provides a certificate or their Conveyancer. This can cause potential problems given the length of the Overage Period and if the Beneficiary cannot be traced after say 20 years in which case it will be impossible to sell or transfer the property. In those circumstances a way of overcoming this would be for the person transferring requests that the transferee enters into a Deed of Covenant albeit that the Beneficiary will not sign the Deed of Covenant and post it to the last known address and that way the Conveyancer for the Transferee can give the appropriate certificate. This can potentially have a serious affect on the ability to dispose of the property in the future.

Upon looking at clause 8.1 (a) again this does not seem to be quite correct. I think you should have omitted reference to an Overage Disposal from the Permitted Disposal and a Permitted Disposal would be simply clause (c) and in those circumstances there would be no Overage Payments payable whatsoever. I refer you to the PLC precedent in this respect.

I look forward to hearing from you.

Kind regards.

Yours sincerely

Kevin George
For Coodes LLP
Email: kevin.george@coodes.co.uk

Please reply to the Liskeard Office

161107
Received from
Shulman

Date

Windhill Investments Limited

Liskeard Town Council

OVERAGE DEED

Land on the east side of
Eastern Avenue, Liskeard

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THIS DEED is dated

PARTIES

- (1) **WINDHILL INVESTMENTS LIMITED** incorporated and registered in England and Wales with company number 04077630 whose registered office is at Terleys, Mole Hill Green, Felstead, Essex, CM6 3JP (**Seller**).
- (2) **LISKEARD TOWN COUNCIL** incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] **OR** [INDIVIDUAL NAME] of [INDIVIDUAL ADDRESS]] (**Buyer**).

BACKGROUND

- (A) By a transfer dated the same date as this Deed, the Seller has transferred the Property to the Buyer.

AGREED TERMS

1. INTERPRETATION

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

1.1 Definitions:

Beneficiary: means the Seller or in the event the Seller is wound up for whatever reason during the Overage Period means the Shareholders of the Seller at the date the Seller is wound up.

Certificate: means a certificate prepared by the Buyer's accountant setting out in detail how they calculated the relevant Overage Payment,

Completed Residential Unit: a Residential Unit that is fit for immediate occupation and use.

Deed of Covenant: a deed of covenant with the Beneficiary containing covenants in the same terms as those given by the Buyer in this Deed with such minor modifications as the Beneficiary may agree.

Deemed Disposal Value: the Market Value at the End Date of an Unsold Residential Unit.

Default Rate: 4% per annum above the Interest Rate.

Development: any development within the meaning of section 55 of the Town and Country Planning Act 1990 of the whole or any part or parts of the Property.

Development Costs: the costs reasonably and properly incurred by the Buyer with third parties not connected or associated in any way with the Buyer in connection with the Residential Development including (but not limited to) the costs falling within the categories set out in the Schedule 1 provided that there shall be no double-counting so that no item shall be included within Development Costs more than once.

Development Profits: means a sum calculated using the following formulae which is to be calculated within 6 months of practical completion of the last Completed Residential Unit on the Property:

$$A - (B + C + D)$$

Where:

A = the total Disposal Value of all the Completed Residential Unit on the Property;

B = £1;

C = the Development Costs; and

D = the total of all Overage Payment 1 payments.

Disposal: a disposition within the meaning of section 27(2) of the Land Registration Act 2002 of the whole or any part or parts of the Property.

Disposal Value: means either;

- (a) the Market Value at the relevant Trigger Date 1 of the Residential Unit disposed of under that Overage Disposal; or
- (b) in the event of that there is an Unsold Residential Unit at the End Date, the Market Value of the Unsold Residential Unit at the End Date.

End Date: (25 years).

Independent Surveyor: a Fellow of the Royal Institution of Chartered Surveyors with at least ten years' experience in valuing properties similar to the Property, for uses similar to the Residential Development, and whose usual place of practice is within a [NUMBER] mile radius of the Property.

Interest Rate: the base rate from time to time of Barclays Bank plc.

Market Value: the estimated amount for which the relevant Residential Unit should exchange 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:

- (a) it is assessed in accordance with VPS 4 paragraph 1.2 of the RICS Valuation - Professional Standards 2014;
- (b) the provisions of this Deed are disregarded;
- (c) the relevant Residential Unit has been practically completed and is ready for immediate occupation and use;
- (d) the relevant Residential Unit has vacant possession;
- (e) the relevant Residential Unit has the benefit of any easements, wayleaves, sight-line covenants and other agreements necessary to provide access, visibility splays or services to or from the relevant Residential Unit;
- (f) the relevant Residential Unit is assumed to be free from all encumbrances

Market Value 1: the estimated amount for which the Property should exchange 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:

- (g) it is assessed in accordance with VPS 4 paragraph 1.2 of the RICS Valuation - Professional Standards 2014;
- (h) the provisions of this Deed are disregarded;

- (i) the Property has vacant possession;
- (j) the Property has the benefit of any easements, wayleaves, sight-line covenants and other agreements necessary to provide access, visibility splays or services to or from the relevant Residential Unit;
- (k) the Property is assumed to be free from all encumbrances

Overage Disposal: the first occasion on which each and every Residential Unit is disposed of as a Completed Residential Unit at arm's length in the open market by way of:

- (a) a sale of the freehold interest in that Residential Unit; or
- (b) the grant of a long leasehold interest in that Residential Unit at a premium for a term of not less than 99 years

For the avoidance of doubt, any lease granted for less than 99 years but which is capable of being automatically renewed for a period of up to and or exceeding 99 years in total shall be an Overage Disposal for the purposes of this Deed.

Overage Payment: means Overage Payment 1 and Overage Payment 2 and Overage Payment 3.

Overage Payment 1: 50% of the Disposal Value of a Residential Unit.

Overage Payment 2: 50% of the Development Profits.

Overage Payment 3: 50% of the gross proceeds of sale howsoever received in respect of the sale of the Property.

Overage Period: 25 years starting on the date of this Deed and ending at midnight on the End Date.

Payment Date: the date on which an Overage Payment is to be made in accordance with clause 2.

Permitted Disposal: any of the following Disposals:

- (a) an Overage Disposal; and
- (b) a sale of the Property prior to the commencement of any Development; and
- (c) the grant of easements or rights, transfer, lease or dedication of any part of the Property to:
 - (i) a local or other public authority pursuant to a requirement in an agreement or unilateral undertaking under section 106 of the Town and Country Planning Act 1990;
 - (ii) a highways authority to comply with highways requirements or in connection with the adoption or dedication of public highway; and
 - (iii) a utilities company for an electricity substation, gas governor, sewage or water pumping station, drainage balancing device or other similar matters for the provision of services.

Professional Team: any specialist advisers, consultants or sub-consultants that may from time to time be appointed in connection with the Residential Development.

Property: Land on the east side of Eastern Avenue, Liskeard being all that land registered at the Land Registry under title number CL265064.

Records: all accounts, documents, records, books, ledgers, receipts, discs, files, folders, vouchers, VAT returns, computer data or other evidence that the Buyer should reasonably keep, for the purpose of accurately ascertaining and demonstrating the Development Costs, Disposal Proceeds, Disposal Values, and any Overage Payments due or made.

Requisite Consents: the planning permission, 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 Residential Development or for its intended use as contemplated by the terms of the planning permission.

Residential Unit: a house, flat or any other structure (whether or not construction of that house, flat or other structure has been commenced or completed) and is intended for residential use:

- (a) including any ancillary land and facilities for use in connection with that house, flat or other structure including (but not limited to) any:
 - (i) parking space; and
 - (ii) garage.

Trigger Date: means Trigger Date 1 and Trigger Date 2 and Trigger Date 3.

Trigger Date 1: is:

- (a) each and every date on which an Overage Disposal is completed; and
- (b) if there are any Unsold Residential Units at the End Date, the End Date.

Trigger Date 2: is 6 months following practical completion of the last Completed Residential Unit on the Property.

Trigger Date 3: is the date on which the Property is sold prior to the commencement of any Development on the Property.

Unsold Residential Unit: any Residential Unit which, by the End Date, has not been disposed of under a completed Overage Disposal.

VAT: value added tax chargeable under the Value Added Tax Act 1994 and any similar replacement tax and any similar additional tax.

Working Day: any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory Bank Holiday.

- 1.2 A **person** includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).
- 1.3 Unless otherwise specified, a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time.
- 1.4 A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision.
- 1.5 Unless the context otherwise requires, references to clauses are to the clauses of this Deed.
- 1.6 Clause headings shall not affect the interpretation of this Deed.

2. OVERAGE PAYMENT

- 2.1 On each and every occasion that a Trigger Date 1 occurs during the Overage Period an Overage Payment 1 shall immediately become due from the Buyer to the Beneficiary.
- 2.2 The Buyer covenants that it shall pay to the Beneficiary the Overage Payment 1 due under clause 2.1 on Trigger Date 1 unless the amount of Overage Payment 1 has not been agreed pursuant to clause 4.2 prior to Trigger Date 1 and in such circumstances clause 2.3 will prevail.
- 2.3 If at Trigger Date 1 the Overage Payment 1 has not been agreed the Buyer will pay to the Beneficiary 50% of the what the Buyer acting reasonably calculates the Overage Payment 1 to be and covenants to pay to the Beneficiary the balance of Overage Payment 1 within 2 working days of it being agreed between the parties or determined pursuant to clause 5.
- 2.4 In the event Trigger Date 2 occurs during the Overage Period, Overage Payment 2 shall immediately become due from the Buyer to the Beneficiary.
- 2.5 The Buyer covenants that it shall pay to the Beneficiary the Overage Payment 2 due under clause 2.4 on Trigger Date 2.
- 2.6 In the event Trigger Date 3 occurs during the Overage Period, Overage Payment 3 shall immediately become due from the Buyer to the Beneficiary.
- 2.7 The Buyer covenants that it shall pay to the Beneficiary the Overage Payment 3 due under clause 2.6 on Trigger Date 3 unless the amount of Overage Payment 3 has not been agreed pursuant to clause 4.2 prior to Trigger Date 3 and in such circumstances clause 2.8 will prevail.
- 2.8 If at Trigger Date 3 the Overage Payment 3 has not been agreed the Buyer will pay to the Beneficiary 50% of the what the Buyer acting reasonably calculates the Overage Payment 3 to be and covenants to pay to the Beneficiary the balance of Overage Payment 3 within 2 working days of it being agreed between the parties or determined pursuant to clause 5.
- 2.9 The Buyer covenants with the Beneficiary that it shall pay interest at the Interest Rate to the Beneficiary on any sum that becomes due this clause 2. Such interest shall accrue on a daily basis for the period from and including the relevant Trigger Date 1 or Trigger Date 2 or Trigger Date 3 to but excluding the relevant Payment Date.
- 2.10 The Buyer covenants with the Beneficiary that it shall pay interest at the Default Rate to the Beneficiary on any sum due under this clause 2 that is not paid on its Payment Date. Such interest shall accrue on a daily basis for the period from and including the relevant Payment Date to and including the date of payment (whether before or after any judgment) and shall not affect any other remedy the Beneficiary may have.

3. RECORD KEEPING

- 3.1 The Buyer covenants with the Beneficiary that it shall keep accurate Records.
- 3.2 The Buyer covenants with the Beneficiary that it shall make the Records available for inspection upon reasonable request at any time by the Beneficiary, its accountants or authorised agents and shall provide copies of the Records to the Beneficiary upon reasonable request.
- 3.3 The Beneficiary may, in its discretion, arrange for the Records to be audited from time to time by a professionally qualified independent auditor or accountant appointed by the Beneficiary.

4. NOTIFICATION

- 4.1 The Buyer covenants with the Beneficiary that it shall:

- (a) notify the Beneficiary in writing within 10 Working Days of the date on which:
 - (i) commencement of construction of any Development on the Property; and
 - (ii) practical completion of the whole or any part of any Development which is commenced on the Property.
- (b) allow the Beneficiary and its surveyor access to the Property at all reasonable times and on reasonable prior notice to inspect the Property;
- (c) supply the Beneficiary with a copy of any agreement for a Disposal of the whole or any part or parts of the Property that is entered into by the Buyer during the Overage Period within 10 Working Days of that agreement being entered into;
- (d) notify the Beneficiary in writing within 10 Working Days of completion of any Disposal of the whole or any part or parts of the Property during the Overage Period that the Buyer considers is not an Overage Disposal and at the same time supply the Beneficiary with:
 - (i) a copy of the instrument effecting that Disposal; and
 - (ii) appropriate evidence that is satisfactory to the Beneficiary (acting reasonably) that such Disposal is not an Overage Disposal; and
- (e) notify the Beneficiary in writing within 30 Working Days of an anticipated Trigger Date 1 or Trigger Date 2 or Trigger Date 3 and at the same time supply the Beneficiary with a Certificate and all appropriate evidence and documentation supporting the amounts stated in the Certificate.

4.2 Within 20 Working Days following receipt by the Beneficiary of all the documents and evidence to be provided by the Buyer in accordance with clause 4.1(e), the Beneficiary will notify the Buyer in writing whether the Beneficiary agrees or disagrees with any of the amounts stated in the Certificate. The Beneficiary shall at the same time provide written reasons if the Beneficiary disagrees with any of the amounts stated in the Certificate. If the Beneficiary does not respond within the said period of 20 Working Days then the Beneficiary shall be deemed to have agreed the amounts stated in the Certificate.

5. DISPUTES

- 5.1 If the Buyer and the Beneficiary fail to agree the amount of an Overage Payment pursuant to clause 4.2 either party may refer the matter for determination by an Independent Surveyor.
- 5.2 The parties shall agree on the appointment of the Independent Surveyor and shall agree with the Independent Surveyor the terms of the appointment.
- 5.3 If the parties are unable to agree on an Independent Surveyor or the terms of the appointment within 10 Working Days from and including the date on which the matter was referred for determination under clause 5.1, either party shall then be entitled to request the President for the time being of the Royal Institution of Chartered Surveyors to appoint the Independent Surveyor and to agree with the Independent Surveyor the terms of the appointment.
- 5.4 The Independent Surveyor is required to prepare a written decision and give notice (including a written copy) of the decision on the amount of the relevant Overage Payment (as the case may be) to the parties within 20 Working Days from and including the date of the Independent Surveyor's appointment.
- 5.5 If the Independent Surveyor dies or becomes unwilling or incapable of acting, or does not deliver the decision within the time required by this clause then:

- (a) either party may apply to the President of the Royal Institution of Chartered Surveyors to discharge the Independent Surveyor and to appoint a replacement Independent Surveyor; and
 - (b) this clause shall apply to the new Independent Surveyor as if they were the first Independent Surveyor appointed.
- 5.6 The parties are entitled to make submissions to the Independent Surveyor including oral submissions and will provide (or procure that others provide) the Independent Surveyor with such assistance and documents as the Independent Surveyor reasonably requires for the purpose of reaching a decision.
- 5.7 The Independent Surveyor shall act as an expert and not as an arbitrator. The Independent Surveyor's written decision shall be final and binding on the parties in the absence of manifest error or fraud.
- 5.8 The Buyer and the Beneficiary agree to pay the Independent Surveyor's costs in the proportions determined by the Independent Surveyor within 10 Working Days from and including a demand for payment. If they are not so paid, the party against whom the costs were not awarded shall be entitled to pay the Independent Surveyor the sums due and recover the amount from the other party on demand.
- 5.9 In default of agreement pursuant to clause **Error! Reference source not found.**, the Overage Payment shall be the amount determined by the Independent Surveyor and the date of issue of the Independent Surveyor's written decision shall be taken as the date of determination for the purposes of clauses **Error! Reference source not found.**, 2.5 or 2.7.

6. ASSIGNMENT OF BENEFIT

The benefit of the Buyer's covenants in relation to any matters contained in this Deed is assignable by the Beneficiary.

7. DISPOSALS AND RESTRICTION

- 7.1 The Buyer covenants with the Beneficiary not to make any Disposal (except a Permitted Disposal) at any time during the Overage Period without first procuring that the person to whom that Disposal is being made has executed a Deed of Covenant.
- 7.2 Buyer covenants with the Beneficiary that it shall apply for the entry of the following restriction against the Buyer's title to the Property at HM Land Registry simultaneously with the registration of the transfer of the Property to the Buyer and shall procure that the restriction has priority to any mortgage or charge entered into by the Buyer:

"No disposition of the registered estate (other than a charge) by the proprietor of the registered estate is to be registered without a Certificate signed by the Beneficiary or their Conveyancer that clause 8.1 of an Overage Deed dated the day of 2016 between Windhill Investments Limited (1) and Liskeard Town Council (2) have been complied with. ."

8. BENEFICIARY'S OBLIGATIONS

- 8.1 The Beneficiary covenants with the Buyer that the Beneficiary, its successors in title or assignees shall:
 - (a) provide consent for the registration of a Permitted Disposal at Land Registry upon receipt of the full Overage Payment or 50% of Overage Payment 1 or 50 % of Overage Payment 3 pursuant to clause 2.3 and 2.8 in the Beneficiary's nominated account

- (b) provide consent for the registration of a Disposal (excluding a Permitted Disposal) at HM Land Registry immediately on receipt of a Deed of Covenant properly executed by the person to whom that Disposal is being made provided that there are then no outstanding sums due from the Buyer under the terms of this Deed; and
- (c) apply for the withdrawal of the restriction entered against the title to the Property within 28 Working Days from and including the end of the Overage Period.

9. COSTS

Each Party shall be responsible for their own costs in complying with the provisions set out in Clause 8.

10. VAT

- 10.1 Each amount stated to be payable by the Buyer to the Beneficiary under or pursuant to this Deed is exclusive of VAT (if any).
- 10.2 If any VAT is chargeable on any supply made by the Beneficiary under or pursuant to this Deed, the Buyer covenants with the Beneficiary that it on receipt of a valid VAT invoice, pay the Beneficiary an amount equal to that VAT.

11. THIRD PARTY RIGHTS

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

12. ENTIRE AGREEMENT

- 12.1 This Deed constitutes the whole agreement between the parties and supersedes all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to its subject matter.
- 12.2 Each party acknowledges that in entering into this Deed it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made negligently or innocently) other than those set out in this Deed.
- 12.3 Nothing in this clause shall limit or exclude any liability for fraud.

13. JOINT AND SEVERAL LIABILITY

Where the Buyer comprises more than one person, those persons shall be jointly and severally liable for the obligations and liabilities of the Buyer arising under this Deed and the Beneficiary may take action against, or release or compromise the liability of, or grant time or other indulgence to, any one of those persons without affecting the liability of any other of them.

14. GOVERNING LAW

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

15. JURISDICTION

Subject to clause 5, 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 Deed or its subject matter or formation (including non-contractual disputes or claims).

This Agreement has been entered into as a Deed on the date stated at the beginning of it.

Executed as a deed by **WINDHILL
INVESTMENTS LIMITED**

acting by
and

.....
[Director]

.....
[Director/Secretary]

SIGNED on behalf of)

LISKEARD TOWN COUNCIL)

Mayor

Town Clerk

Schedule 1 - Categories of costs

- The purchase price, stamp duty land tax, fees of HM Land Registry, legal and estate agent's fees and disbursements in connection with the acquisition of the Property by the Buyer from the Beneficiary.
- The costs of preparing all plans, specifications, drawings, engineering calculations, bills of quantity and other data that may be required in connection with the Residential Development.
- The costs of seeking to obtain or obtaining the Requisite Consents.
- The costs of negotiating, entering into and complying with any Planning Obligation.
- The costs of any Community Infrastructure Levy payable pursuant to sections 205-225 of the Planning Act 2008.
- The costs of seeking to obtain or obtaining any release or variation of any easement, covenant, right or other interest in or over the Property that would impede or restrict the Residential Development or the use and enjoyment of the Residential Development.
- 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.
- 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.
- The costs of carrying out any demolition, site clearance and the works to construct the Residential Development.
- The costs of procuring the appointments of the Professional Team.
- The fees of the Professional Team.
- Any finance charges, fees and interest paid on any loan or other sum to finance the Residential Development.
- The costs of insurance of the Property.
- Any rates, supplements, taxes, levies, duties, charges or other outgoings.
- The costs of the provision of water, electricity and other utilities to the Property.