

Dated

31st January

2019

(1) Ensco 1068 Limited

and

(2) Peter Michael Harris

and

(3) Vanessa Jane Harris

and

(4) Craig Lancelot Mitchell

and

(5) MC Trustees Limited

and

(6) Hinton Properties (Grovefield Way) Limited

and

(7) Cotswold Motor Group Limited

To

(8) Cheltenham Borough Council

Unilateral Undertaking
under Section 106 of the Town and Country
Planning Act 1990 (as amended)

relating to

Planning Application ref. 16/02208/FUL

Land at North Road West and Grovefield Way,
Cheltenham

THIS UNDERTAKING is made this 31st day of January 2019

GIVEN BY:

1. **Ensco 1868 Limited** (Company Registration No 08995651) whose registered office is at 340 Melton Road, Leicester, LE4 7SL ("**Ensco**");
2. **Peter Michael Harris** of 154 Ulverscroft Lane, Newton Lindford, Leicester, LE6 0AJ ("**Peter Harris**");
3. **Vanessa Jane Harris** of 154 Ulverscroft Lane, Newton Lindford, Leicester, LE6 0AJ ("**Vanessa Harris**");
4. **Craig Lancelot Mitchell** of 40 Wakerley Road, Barrowden, Oakham, Leicestershire, LE15 8EF ("**Craig Mitchell**");
5. **M C Trustees Limited** (Company Registration No 06196502) whose registered office is at 1 New Walk Place, Leicester, LE1 6RU ("**MC Trustees**");

(together "**the Owners**")
6. **Hinton Properties (Grovefield Way) Limited** (Company Registration No 10164921) whose registered office is at The Old Council Chambers, Halford Street, Tamworth, Staffordshire, B79 7RB, (the "**Developer**");
7. **Cotswold Motor Group Limited** (Company Registration No 03028787) whose registered office is at Corinthian Way, The Reddings, Cheltenham, England, GL51 6UP ("**Cotswold Motor Group**");

To:

8. **Cheltenham Borough Council** of Municipal Offices Promenade Cheltenham GL50 9SA (the "**Council**").

WHEREAS:

- (A) Ensco is the freehold owner of part of the Site which is registered at the Land Registry under Title Number GR386623 free from encumbrances that would prevent Ensco from entering into this Undertaking subject to a contract to purchase in favour of the Developer and Cotswold Motor Group dated 7 March 2017.
- (B) Peter Harris and Vanessa Harris as Trustees of the Harris Retirement Fund and Craig Mitchell and MC Trustees as Trustees of the MCTPP and MC Trustees are the freeholder owners of part of the Site which is registered at the Land Registry under Title Number GR386708 free from encumbrances that would prevent them from entering into this Undertaking.
- (C) The Developer submitted the Planning Application to the Council.
- (D) For the purposes of the 1990 Act, the Council is the local planning authority for the area within which the Site is located.

(E) By notice of refusal dated 14 December 2017 the Council refused to grant the Planning Permission for the reasons set out in the notice. The Developer has submitted the Planning Appeal and together with the Owners gives this Undertaking with the intent that any objections of the Council to the grant of the Planning Permission are overcome.

NOW THIS UNDERTAKING WITNESSES AS FOLLOWS:

1 DEFINITIONS

In this deed the following words and expressions shall unless the context otherwise requires have the precise meaning set out below:

- | | |
|----------------------------|---|
| “1990 Act” | means the Town and Country Planning Act 1990 (as amended); |
| “Blue Land” | means the land coloured blue on the Plan being the part of the Site which is subject to the outline part of the Planning Application; |
| “Commencement Date” | means the date on which the Development commences by the carrying out on the Site pursuant to the Planning Permission of a material operation as specified in section 56(4) of the 1990 Act other than (for the purposes of this Undertaking and no other);

(a) site investigations or surveys;

(b) archaeological works;

(c) site decontamination;

(d) the demolition of any existing buildings or structures

(e) excavation works;

(f) the clearance or re-grading of the Site;

(g) the erection of hoardings and fences;

(h) works connected with infilling;

(i) works for the provision or diversion of drainage or mains services to prepare the Site for |

development

and 'Commence' and 'Commencement of Development' shall be construed accordingly;

“Development”

means the development of the Site by way of a hybrid application seeking detailed planning permission for a 5,034 sq.m of commercial office space (Use Class B1), 502 sq.m day nursery (Use Class D1), 1,742 sq.m supermarket food retail unit (Class A1), a 204 sq.m coffee shop retail unit and drive-thru (Use Classes A1 and A3), with associated parking, landscaping and infrastructure works and outline planning permission sought for the erection of 8,034 sq.m of commercial office space (Use Class B1), together with associated car parking, landscaping and infrastructure works, with all matters reserved (except access) as more particularly described in the Planning Application or as may be amended as part of the Planning Appeal;

“Inspector”

means the person appointed by the Secretary of State to determine the Planning Appeal;

“Landscape Management Plan”

means the document at Appendix 1 of this Undertaking detailing the overall functional and aesthetic objectives of the landscape scheme and maintenance operations associated with the detailed planning application site forming part of the Development to be carried out in accordance with the provisions of Schedule 1 of this Undertaking;

“Occupation”

means occupation of the Development or part thereof for the purposes permitted by the Planning Permission but not occupation for the purposes of construction, fitting out or decoration for marketing or display purposes or in connection with security operations and “Occupy” and “Occupied” shall be construed accordingly;

“Orange Land”

means the land coloured orange on the Plan being the part of the Site which is subject to the detailed

part of the Planning Application;

- “Plan”** means the plan attached to this Undertaking and marked 'Plan';
- “Planning Appeal”** means the appeal submitted by the Developer under s.78(1) of the 1990 Act in respect of the Council's refusal of the Planning Application and given reference number APP/B1605/W/18/3200395;
- “Planning Application”** means the hybrid application for planning permission for the carrying out of the Development made by the Developer and given the reference 16/02208/FUL;
- “Planning Permission”** means any planning permission that will be granted by the Secretary of State for the Development in pursuance of the Planning Application following the completion of this Undertaking or any variation to that permission granted pursuant to Section 73 of the 1990 Act;
- “Secretary of State”** means the Secretary of State for Housing Communities and Local Government (or such successor Secretary of State or minister of state who shall assume the same decision making powers from time to time);
- “Site”** means the land at North Road West and Grovefield Way, Cheltenham, shown edged red on the Plan against which this Undertaking may be enforced; and
- “Street and Car Park Management and Maintenance Plan”** means the document at Appendix 2 of this Undertaking setting out the arrangements for the future management and maintenance of the streets and car parks associated with the detailed planning application site forming part of the Development to be carried out in accordance with the provisions of Schedule 1 of this Undertaking;
- “Working Days”** means any day which is not a Saturday, a Sunday,

a bank holiday or a public holiday in England.

2 INTERPRETATION

- 2.1 The clause headings in this Undertaking are for reference only and do not affect its construction or interpretation.
- 2.2 References to clauses and Schedules are to the clauses and Schedule of this Undertaking, unless stated otherwise.
- 2.3 A reference to a paragraph is to the paragraph of the Schedule in which the reference is made, unless stated otherwise.
- 2.4 Words importing one gender include any other genders and words importing the singular include the plural and vice versa.
- 2.5 A reference to a person includes a reference to a firm, company, authority, board, department or other body and vice versa.
- 2.6 Unless this Undertaking states otherwise, any reference to any legislation (whether specifically named or not) includes any modification, extension, amendment or re-enactment of that legislation for the time being in force and all instruments, orders, notices, regulations, directions, byelaws, permissions and plans for the time being made, issued or given under that legislation or deriving validity from it.
- 2.7 References to the Site include any part of it.
- 2.8 References to any party in this Undertaking include the successors in title of that party and in the case of the Council includes any successor local planning authority exercising planning powers under the 1990 Act.
- 2.9 References to "including" means "including, without limitation".
- 2.10 Any covenant by the Owners not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing.
- 2.11 Where two or more people form a party to this Undertaking, the obligations they undertake may be enforced against them all jointly or against each of them individually.
- 2.12 If any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of this Undertaking shall be unaffected.
- 2.13 The Developer and Cotswold Motor Group enter into this Undertaking in order to consent to the Site being bound by its terms only and the Developer and Cotswold Motor Group shall

have no liability under this Undertaking unless or until they become successors in title to the Owners in respect of the Site.

3 LEGAL EFFECT

- 3.1 This Undertaking is made pursuant to the provisions of Section 106 of the 1990 Act and shall constitute and shall be deemed to contain planning obligations for the purpose of Section 106 of the 1990 Act and in the event of a breach it shall be enforceable by the Council as the local planning authority pursuant to all powers enabling and all enactments which may be relevant for the purposes of giving validity hereto or facilitating the enforcement of the obligations herein contained and shall bind the then Owner's respective interest in the Site subject to the exceptions in clause 3.6.
- 3.2 Without prejudice to the generality to clause 3.1 this Undertaking is further made pursuant to Section 1 of the Localism Act 2011 insofar as the same may be relevant to the enforcement of the obligations contained herein.
- 3.3 No party will be liable for breach of a covenant restriction or obligation contained in this Undertaking after he has parted with all the interest in the Site or the part in respect of which such breach occurs but without prejudice to liability for any subsisting breach of covenant prior to parting with such interest and neither the reservation of any rights or the inclusion of any covenants or restrictions over the property in any transfer or other disposition of the Site or any part thereof will constitute an interest for the purposes of this clause 3.3.
- 3.4 This Undertaking will be registered as a local land charge by the Council.
- 3.5 In the event that the Council shall at any time hereafter grant a planning permission pursuant to an application made under section 73 of the 1990 Act in respect of the conditions relating to the Planning Permission (and for no other purpose whatsoever) references in this Deed to the Planning Application and the Development shall be deemed to include any such subsequent planning applications and planning permissions granted as aforesaid and this Deed shall henceforth take effect and be read and construed accordingly.
- 3.6 Nothing in this Undertaking:
- 3.6.1 prohibits or limits the right to develop any part of the Site in accordance with a planning permission, other than one relating to the Development as specified in the Planning Application, whether or not pursuant to an appeal;
 - 3.6.2 shall be construed as restricting the exercise by the Council of any powers exercisable by it under the 1990 Act or under any other Act in the exercise of their functions as a local authority.

- 3.7 The obligations in this Undertaking will not be enforceable against:
- 3.7.1 a statutory undertaker which acquires any part of the Site or any interest in it for the purposes of its statutory undertaking of function; or
 - 3.7.2 anyone whose only interest in the Site or any part of it is in the nature of the benefit of an easement or covenant.
- 3.8 If in determining the Planning Appeal, the Secretary of State or the Inspector states in his decision letter that any individual obligation within this Undertaking does not comply with regulation 122 of the Community Infrastructure Levy Regulations 2010, or that any individual obligation is not a material consideration in the granting of the Planning Permission pursuant to the Planning Appeal then those obligation(s) will cease to have effect.

4 COMMENCEMENT

This Undertaking will take effect on the Commencement Date except for this clause 4 and clauses 6, 8, 9, and 10 which shall take effect on the date on the date of this Undertaking.

5 OBLIGATIONS OF THE PARTIES

The Owners covenant to comply with the obligations expressed to be on their part set out in the Schedule to this Undertaking in relation to the Development.

6 TERMINATION OF THIS UNDERTAKING

- 6.1 This Undertaking will come to an end if:
- 6.1.1 the Planning Permission is quashed or revoked before the Commencement Date; or
 - 6.1.2 the Planning Permission expires before the Commencement Date without having been implemented;
 - 6.1.3 the Planning Appeal is dismissed; or
 - 6.1.4 in determining the Planning Appeal the Secretary of State or the Inspector states in his decision letter that this Undertaking is not a material planning consideration and/or that no weight can be attached to the deed in determining the Planning Appeal and/or that it does not satisfy Regulation 122 of the Community Infrastructure Levy Regulations 2010.

and in such case this Undertaking shall forthwith determine and cease to have effect with the exception of this clause 6.

7 NOTICES

- 7.1 Any notice, consent, demand or any other communication served under this Undertaking will be effective only if in writing and delivered by hand or sent by first class post, pre-paid or recorded delivery.
- 7.2 Any notice, consent, demand or any other communication served shall be sent to the address of the relevant party set out at the beginning of this Undertaking or to such other address as one party may notify in writing to the others at any time as its address for service.
- 7.3 Any notice given in accordance with sub-clause 7.1 and 7.2 will be deemed to have been received:
- 7.3.1 if delivered by hand, on signature of a delivery receipt provided that if delivery occurs before 9.00 am on a Working Day, the notice will be deemed to have been received at 9.00 am on that day, and if delivery occurs after 5.00 pm on a Working Day, or on a day which is not a Working Day, the notice will be deemed to have been received at 9.00 am on the next Working Day; or
- 7.3.2 if sent by pre-paid first class post or other next working day delivery service, on the second Working Day after posting.

8 CHANGE IN OWNERSHIP

- 8.1 The Owners agree with the Council to give the Council immediate written notice of any change in ownership of any of its freehold interests in the Site occurring before all the obligations under this Undertaking 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).

9 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

The parties to this Undertaking 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 provided that the exclusion of the said Act shall not prevent all or any future successors in title to any of the parties to this Undertaking from being able to benefit from or to enforce any of the provisions of this Undertaking.

10 WAIVER

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

11 JURISDICTION

This Undertaking shall be governed by the laws of England and Wales and the Courts of England shall have sole jurisdiction in respect of the construction of this Undertaking and as to the respective rights and liabilities of the parties.

IN WITNESS of which this Undertaking has been duly executed as a deed and delivered on the date stated at the beginning of this document.

SCHEDULE 1
THE OWNERS' COVENANTS TO THE COUNCIL

The Owners covenant with the Council as follows:

Landscape Management Plan

1. Upon first Occupation of the Development on the Orange Land to manage and maintain the Development in accordance with the Landscape Management Plan unless otherwise agreed with the Council.
2. Prior to Commencement of the Development on the Blue Land the Owners shall submit an updated Landscape Management Plan to the Council for approval and Commencement of the Development shall not occur on the Blue Land until the Landscape Management Plan has been approved by the Council.
3. To manage and maintain the Development on the Blue Land in accordance with the approved Landscape Management Plan unless otherwise agreed with the Council.

Street and Car Park Management and Maintenance Plan

4. Upon first Occupation of the Development on the Orange Land to manage and maintain the Development in accordance with the Street and Car Park Management and Maintenance Plan unless otherwise agreed with the Council.
5. Prior to Commencement of the Development on the Blue Land the Owners shall submit an updated Street and Car Park Management and Maintenance Plan to the Council for approval and Commencement of the Development on the Blue Land shall not occur until the Street and Car Park Management and Maintenance Plan has been approved by the Council.
6. To manage and maintain the Development in accordance with the Street and Car Park Management and Maintenance Plan unless otherwise agreed with the Council.