

**DATED**

**2022**

**ROBERT HITCHINS LIMITED**

**and**

**CHELTENHAM BOROUGH COUNCIL**

**AGREEMENT**

**pursuant to S106 Town and Country Planning Act 1990**

**-Relating to-**

**Land at Oakley Farm, Priors Road, Cheltenham**

**Planning Application Ref. 20/01069/OUT**

**Planning Appeal Ref: APP/B1605/W/21/3273053**

**(Public Open Space)**

THIS DEED is made the                      day of                      2022

BETWEEN:

- (2) **ROBERT HITCHINS LIMITED** (Company Registration Number 0686734) whose registered office is at The Manor, Boddington, Cheltenham, Gloucestershire GL51 0TJ (“**the Owner**”); and
- (3) **CHELTENHAM BOROUGH COUNCIL** of Municipal Offices, 77 Promenade, Cheltenham, Gloucestershire GL50 1PJ (“**the Council**”)

**INTRODUCTION**

- 1. The words and phrases used in this Agreement are defined in Clause 1
- 2. The Council is the Local Planning Authority for the purposes of the Act
- 3. The Owner is registered as the proprietor of the freehold of the Site at the Land Registry under title number GR215822 as more particularly described in the First Schedule
- 4. The Owner has appealed to the Secretary of State against the Council’s non determination of the Application
- 5. The Owner enters into this Agreement with the intent that any objections of the Council to the grant of planning permission are overcome

NOW THIS DEED WITNESSES AS FOLLOWS:

**1. DEFINITIONS**

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

- 1.1. “Act” means the Town and Country Planning Act 1990 or any re-enactment or modification thereof for the time being in force
- 1.2. “Allotments” means an area of the On-Site Open Space set aside for use by individuals under the Smallholdings and Allotments Act 1908 and the Allotments Acts 1922 and 1950 for the growing of

crops sufficient for a minimum of 5 (Five) full-sized plots

- 1.3.** “Application” means the application for outline planning permission submitted to the Council for the Development and allocated reference number 20/01069/OUT and appeal reference APP/B1605/W/21/3273053
- 1.4.** “ARM” means approval of reserved matters for the Development (or part of it) pursuant to the Planning Permission
- 1.5.** “Children’s Play Area” means the play areas to be delivered on the Site in the position as agreed by the Council pursuant to paragraph 2 of the Second Schedule hereof being 5 (five) LAPS and 1 (one) LEAP (unless otherwise agreed in writing between the parties including but not restricted to ARM stage) the specification of which shall be in accordance with the Fields in Trust Standard(s) current at the time of submission of the details
- 1.6.** “Commencement of Development” means the date on which any material operation (as defined in Section 56(4) of the Act) forming part of the Development begins to be carried out other than (for the purposes of this Deed and for no other purpose) operations consisting of site clearance (including vegetation) demolition work investigations for the purpose of assessing ground conditions archaeological investigations remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services erection of any temporary means of enclosure the temporary display of site notices or advertisements construction of temporary accesses or temporary works erection of hoardings and fencing and other site security measures during construction including the

provision of site compounds, and “Commence Development” shall be construed accordingly

- 1.7** “Development” means residential development of up to two hundred and fifty (250) residential dwellings associated infrastructure, ancillary facilities, open space and landscaping. Demolition of existing buildings. Creation of new vehicular access from Harp Hill as set out in the Application
- 1.8** “Dwelling” means a dwelling to be constructed pursuant to the Planning Permission (and for the avoidance of doubt includes the affordable housing units and the open market units) and “Dwellings” is to be construed accordingly
- 1.9** “Expert” means the independent expert appointed for the purposes of clause 13
- 1.10** “Final Certificate” means the written certificate to be issued by the Council in accordance with paragraph 10 of the Second Schedule
- 1.11** “Index” means the All In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors or any successor organisation
- 1.12** “Interest” means interest at three per cent (3%) above the base lending rate of the Barclays Bank Plc from time to time
- 1.13** “Management Company” means a limited company registered at Companies House which is incorporated in England, Wales or Scotland and has its registered office in England
- 1.14** “Maintenance Period” means a period of twelve (12) months after the date of issue of the Provisional Certificate
- 1.15** “Monitoring Fee” means the sum of five hundred pounds (£500.00) to be paid by the Owner to the Council to monitor compliance with this Agreement

<b>1.16</b>	“Occupation(s)” and “Occupied”	means occupation for the purposes permitted by the Planning Permission 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 during construction and “Occupied” and “Occupier(s)” shall be construed accordingly
<b>1.17</b>	“Off Site Contribution”	means the sum of Forty Eight Thousand Five Hundred and Twenty Two pounds (£48,522.00) to be paid by the Owner to the Council for the improvement of the playing pitches at the Beeches or Priors Farm Playing Fields
<b>1.18</b>	“On Site Open Space”	means such areas of land as are to be provided as public open space and Allotments on the Site as part of the Development including the Children’s Play Area and items of natural play equipment (and for the avoidance of doubt shall include a sustainable drainage systems (SuDS)) as approved pursuant to the Second Schedule paragraph 2
<b>1.19</b>	“Plan”	means the plan attached to this Agreement marked drawing number 333.L.1 and entitled Section 106 Plan
<b>1.20</b>	“Planning Permission”	means the planning permission (if any) granted by the Council or the Secretary of State or Secretary of State's inspector in respect of the Application and includes the approved plans thereto and any duly authorised non-material amendments thereto
<b>1.21</b>	“Provisional Certificate”	means the written certificate to be issued by the Council in accordance with paragraph 7 of the Second Schedule
<b>1.22</b>	“Site”	means the land against which this Deed may be enforced as shown edged red on the Plan for

identification purposes only and as more particularly described in the First Schedule

- 1.23** “Working Day(s)” means any day except Saturday and Sunday or a bank holiday or any days which in England and Wales are public holidays

## **2. CONSTRUCTION OF THIS DEED**

- 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 its respective statutory functions

- 2.7** “including” means including without limitation.

- 2.8** References to “the Site” include each and every part thereof
- 2.9** The clause headings herein do not form part of this Agreement and shall have no effect upon the meaning or construction of the provisions of this Agreement
- 2.10** Except where expressly stated to the contrary where agreement approval consent or expression of satisfaction is required from the Council under the terms of this Agreement such agreement approval consent or expression of satisfaction shall not be unreasonably withheld or delayed
- 2.11** Any covenant by the Owner not to do any act or thing shall be deemed to include a covenant not to cause permit or suffer the doing of that act or thing

**3. LEGAL BASIS**

- 3.1** This Agreement is entered into as a Deed pursuant to section 106 of the Act. To the extent that the obligations fall within the terms of section 106 of the Act the obligations contained in this Agreement are planning obligations for the purposes of section 106 of the Act and are enforceable by the Council
- 3.2** To the extent that any of the obligations contained in this Agreement are not planning obligations within the meaning of the Act they are entered into pursuant to powers contained in section 111 of the Local Government Act 1972 section 1 of the Localism Act 2011 and all other enabling powers
- 3.3** The covenants, restrictions and requirements imposed upon the Owner under this Agreement create planning obligations pursuant to section 106 of the Act and are enforceable by the Council as local planning authority

**4. CONDITIONALITY**

- 4.1** This Agreement is (save for Clauses 2.1 to 2.10, 6.1, 6.2, 6.3, 6.5, 7, 8, 9 and 10 which shall be of immediate effect) (and subject to Clause 4.2)

conditional on and shall only take effect on the grant of the Planning Permission

**4.2** The covenants within Clause 5 of this Agreement are conditional upon the Commencement of Development except those that require schemes and plans to be submitted on the first ARM application which shall be conditional upon the grant of Planning Permission

**4.3** In the event that the Application falls to be determined by Secretary of State or by an Inspector appointed by the Secretary of State (as to the whole or any part of this Deed, as appropriate) the obligations hereunder are conditional upon the Secretary of State or the Inspector appointed by the Secretary of State not stating in his report that the provisions are irrelevant or not required in order to grant Planning Permission UNLESS such decision is quashed following a successful legal challenge

**5. THE OWNER'S COVENANTS**

The Owner covenants with the Council as set out in the Second Schedule and the Third Schedule

**6. MISCELLANEOUS**

**6.1** The Owner 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

**6.2** No provisions of this Agreement shall be enforceable under the Contracts (Rights of Third Parties) Act 1999

**6.3** The Owner hereby consents to the registration of the Agreement as a local land charge

**6.4** Any notices required to be given under this Agreement shall be in writing and shall be delivered personally or sent by pre-paid recorded delivery post to the principal address or registered office or last known address of an individual (as appropriate) of the relevant party and shall be deemed to have been served as follows:

6.4.1 If personally delivered, at the time of delivery; and



6.4.2 If sent by recorded delivery post, forty eight (48) hours after the envelope was delivered into the custody of the postal authority within the United Kingdom

6.5 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

6.6 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 expires prior to the Commencement of Development the Planning Permission (without the consent of the Owner) is modified by any statutory procedure or development of the Site is undertaken pursuant to another planning permission granted after the date of this Agreement insofar as it has not already been complied with or should have been complied with

6.7 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 or any other one relating to the Development) granted (whether or not on appeal) after the date of this Agreement

6.8 Any Contribution referred to in this Agreement shall be increased or decreased by an amount equivalent to the increase or decrease in the Index from the date hereof until the date on which such Contribution is paid

6.9 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

## 7. **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 Agreement shall constitute a continuing waiver and no such waiver shall prevent the Council from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default

## 8. **CHANGE IN OWNERSHIP**

The Owner will give to the Council immediate written notice of any change in ownership of 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 or unit of occupation purchased by reference to a plan PROVIDED THAT this obligation shall not apply to any transfers of individual Dwellings nor any transfer to a statutory undertaker or service or utility company

**9. JURISDICTION**

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

**10. DELIVERY**

The provisions of this Agreement (save this clause) shall be of no effect until it has been dated

**11. EXCLUSIONS/LIABILITY FOR BREACH OF COVENANTS**

11.1 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 that part of the Site to which the breach relates but without prejudice to liability for any subsisting breach arising prior to parting with such interest PROVIDED THAT the reservation of any rights of access and/or to lay or maintain equipment shall not constitute an interest in the Site for the purpose of this Clause 11.1

11.2 The obligations hereunder shall not be enforceable against:

11.2.1 the owners and/or occupiers of an individual Dwelling or those deriving title from them;

11.2.2 any statutory undertaker or other person who acquires any part of the Site or any interest in it for the purposes of the supply of electricity, gas, water, drainage, telecommunication services or public transport services

11.2.3 a chargee (and its successors) of any Registered Provider (which expression shall mean a housing association or other body which is

registered with the Homes England as a social landlord) or residential occupier of an Affordable Housing Unit (which expression shall mean dwellings constituting affordable housing within the meaning of Annex 2 to the National Planning Policy Framework (February 2019)) taking possession or effecting a power of sale under a charge in default

**12. WARRANTY**

The Owner hereby warrants to the Council that as at the date hereof it has not leased mortgaged charged or otherwise created any interests in the Site other than those contained mentioned or referred to in title number GR215822 as at the 27 May 2021

**13. DISPUTE RESOLUTION**

13.1 In the event of any dispute or difference relating to any matter contained in this Agreement any party to the dispute (including successors in title to the parties to this Agreement) may by serving notice of the same on the other party or parties require it to be referred for determination by an Expert (who will act as an expert not an arbitrator) appointed under clause 13.2 below acting in accordance with clauses 13.3 to 13.9

13.2 If the parties do not make the appointment of the Expert by agreement within fourteen (14) days of service requiring reference of the dispute the Expert shall be nominated upon the application of either party by the President (or other officer to whom the making of such appointment is for the time being delegated) of the Law Society and the Expert shall be an independent person who has been professionally qualified in respect of the subject matter of the dispute or difference for not less than ten (10) years

13.3 Unless the Expert shall direct to the contrary not more than twenty eight (28) days after his appointment the parties shall exchange and copy to the Expert written summaries of their cases together with a bundle of key documents relied upon

13.4 The Expert shall be at liberty to visit the Site relevant to the dispute unaccompanied and to call for such written evidence from the parties as he may require

- 13.5 The Expert shall not unless he directs to the contrary hear oral representations from any party to the dispute
- 13.6 The Expert shall fully consider all submissions and evidence when making his decision
- 13.7 The Expert shall give his decision in writing and shall give reasons
- 13.8 The Expert shall use reasonable endeavours to give his decision and the reason for it as speedily as possible and in any event within forty two (42) days of his appointment.
- 13.9 The Expert's decision (save in the case of manifest or legal error) including his decision as to costs shall be final and binding. The Expert's fees shall be payable by the parties in such proportions as he shall determine and in default of such determination equally between them

**14. SECTION 73 VARIATION**

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 Act in respect of the conditions relating to the Planning Permission save and in so far as the Agreement has been amended by way of a deed of variation prior to the grant of such planning permission references in this Agreement to the Application shall (save for the purposes of the definition of Planning Permission in relation to clauses 4.1, 6.6 and 6.7) be deemed to include any such subsequent planning applications as aforesaid and this Agreement shall henceforth take effect and be read and construed accordingly

**15. EVIDENCE OF COMPLIANCE**

In addition and without prejudice to the proper exercise at any time by the Council of any of its statutory powers functions or discretions in relation to the Site or otherwise the Owner shall if and when required by the Council from time to time provide the Council (without charge and within ten (10) Working Days) with such information including any copies of any documents as the Council may reasonably request for the purpose of ascertaining whether there has been compliance with or any breach of the requirements of this Agreement and the Schedules hereto

**IN WITNESS** whereof the parties hereto have executed and delivered this Deed on the day and year first before written

## **FIRST SCHEDULE**

### **Details of the Owner's Title and Description of the Site**

Registered land under title number GR215822 held at the Land Registry, Gloucester Office, being all that freehold land known as Oakley Farm, Priors Road, Cheltenham, GL52 5AQ and shown for identification purposes edged red on the Plan

## **SECOND SCHEDULE**

### **The Owner's Covenants with the Council**

#### **ON SITE OPEN SPACE**

1. To take reasonable steps to notify potential occupiers of the Dwellings of the existence nature and location of the On Site Open Space (in particular the Children's Play Area and Allotments) and any items of natural play before any contract to purchase or occupy any Dwelling has been entered into between the potential occupiers and the Owner
2. To submit for approval by the Council with its application for the first ARM and prior to Commencement of Development a plan showing the proposed location of the On Site Open Space together with a detailed specification for the phasing laying out equipping and maintaining the On Site Open Space (including, in respect of the Allotments, the details regarding (inter alia) the positioning number and division of plots access (including vehicular access) and arrangements for provision of water, surface water drainage and fencing) and items of natural play (to Fields in Trust standard(s) at the time of submission of the details) including vehicular and pedestrian/cycleway accessways to access the same and not to Commence Development until such approval has been obtained
3. To lay out provide and equip the On Site Open Space in accordance with the plan timings and specification approved by the Council pursuant to paragraph 2 of this Second Schedule
4. No Dwellings within fifty (50) metres of the Children's Play Area and any items of natural play shall be Occupied until reasonable endeavours have been used to obtain a Royal Society for the Prevention of Accidents certificate (or such other form of certificate agreed to by the Council) for the Children's Play Area and the items of natural play (as relevant)
5. Not to Occupy or permit to be Occupied more than fifty per cent (50%) of the Dwellings of the Development until a Provisional Certificate for the On Site Open Space has been issued in accordance with paragraph 8 below and it is available for use by the general public
6. On completion of the laying out and provision of the On Site Open Space to serve written notice thereof on the Council

7. After receiving the notice set out in paragraph 6 above the Council shall satisfy themselves as to whether or not the On Site Open Space has been completed in accordance with the specification approved under paragraph 2 above (or as may have been amended in writing following agreement with the Council) and if then satisfied it shall issue a Provisional Certificate to that effect within twenty (20) Working Days of receipt of the notice pursuant to paragraph 6 above
8. If the Council is not satisfied as provided in paragraph 7 above then the Owner will be notified in writing within twenty (20) Working Days of the Council receiving the written notice referred to in paragraph 6 above and such notification shall set out the works of rectification required to remedy any defects or omissions which are not in accordance with the approved specification and the process described in paragraphs 6, 7 and 8 hereof shall be repeated until the Council issues the Provisional Certificate. If the Council fails to notify the Owner of any defects or omissions within such twenty (20) Working Day period then it shall be deemed to have issued a Provisional Certificate
9. The Owner shall maintain the On Site Open Space for the Maintenance Period in accordance with the specification approved pursuant to paragraph 2 above and if any damage shall appear arise or occur then the Owner shall at its own expense as soon as practicable after such damage shall appear arise or occur make good the same to the reasonable satisfaction of the Council
10. Two (2) months prior to the expiry of the Maintenance Period for the On Site Open Space the Owner will notify the Council in writing of the date the Maintenance Period in respect of that On Site Open Space expires and if the Council desires the Council will make any inspection within twenty (20) Working Days of that notice and within fifteen (15) Working Days of the date of the inspection the Council will notify the Owner in writing of any defects or damage arising which is required to be remedied before the issue of the Final Certificate for the On Site Open Space and the Council will if then satisfied that any damage or defects have been made good by the Owner to the reasonable satisfaction of the Council issue the Final Certificate to that effect within twenty (20) Working Days. If the Council fails to notify the Owner of any defects or omissions within such twenty (20) Working Day period then it shall be deemed to have issued a Final Certificate
11. Following the issue of the Final Certificate in respect of the On Site Open Space (excluding the Allotments) and the obtaining of a Royal Society for the Prevention of Accidents certificate (or such other form of certificate agreed to by the Council) for the



Children's Play Area and items of natural play (as applicable) the Owner shall transfer the freehold interest in the On Site Open Space (excluding the Allotments) for £1 to a Management Company (whose principal objects include the maintenance of the On Site Open Space) PROVIDED THAT any transfer shall contain a restriction not to use the land transferred other than as open space for use at all times by the general public and for no other purpose (save for ancillary purposes thereto) and to maintain it in accordance with the On Site Open Space maintenance scheme approved pursuant to paragraph 1.1 of the Third Schedule below and at all times maintain public liability insurance in the sum of £5 million in respect of it and the transfer of the On Site Open Space (excluding the Allotments) shall grant all rights and easements properly and reasonably required for the provision of access drainage water and electricity to serve the On Site Open Space (excluding the Allotments) and in any case in which there is a transfer to a Management Company the provisions of the Third Schedule shall apply

12. Unless and until the relevant part of the On Site Open Space is transferred to a Management Company in accordance with paragraph 11 or 13 of this Schedule or is transferred to the Council or its nominee in accordance with paragraph 13 of this Schedule, the Owner shall maintain each area of On Site Open Space in accordance with the specification approved pursuant to paragraph 2 above and shall allow the use of each area of the On Site Open Space (excluding the Allotments) by the general public from the date the Provisional Certificate is issued for that area of On Site Open Space and maintain public indemnity insurance in the sum of at least £5 million (in aggregate) in respect of the same
13. The Allotments shall be offered to the Council or its nominee by the Owner at the time agreed pursuant to paragraph 2 above for £1 (if demanded) and within 3 months following the issue of the Final Certificate in respect of the Allotments the Owner shall transfer the freehold interest in the Allotments to the Council or its nominee (on like terms as set out in paragraph 11 above, save for the provision of electricity and save that the use of the land transferred shall be restricted to use for Allotments only) and if, within 3 months following the issue of the Final Certificate in respect of the Allotments, such transfer is refused by the Council or its nominee, the Allotments shall be transferred to the Management Company and the provisions of the Third Schedule shall apply to the land transferred
14. The standard Conditions of Sale (current at the time of the transfers) shall apply to the transfers referred to in paragraph 11 and 13 above insofar as the same are not inconsistent with the expressed terms of this Agreement

15. If the Development shall be built out in phases then the provisions above in relation to the On Site Open Space shall, where applicable, apply equally to each phase of the Development
16. To pay to the Council the Monitoring Fee on or prior to Commencement of Development
17. To pay to the Council 50% of the Off Site Contribution on or prior to Commencement of Development and to pay to the Council the remaining 50% of the Off Site Contribution on or prior to first Occupation of 50% of the Dwellings

18. **Notice**

To give written notice to the Council upon the happening of the following events if not otherwise mentioned herein upon;

- 1) Commencement of Development
- 2) first Occupation of 50% of the Dwellings
- 3) transfer of the On-Site Open Space to the Management Company

## **THIRD SCHEDULE**

### **Management Company**

The parties agree that in this Schedule, reference to 'On Site Open Space' excludes the Allotments unless the Allotments are transferred to the Management Company pursuant to paragraph 13 of the Second Schedule

1. The Owner covenants with the Council that it shall:
  - 1.1 Prior to the transfer of any On Site Open Space to a Management Company submit to the Council for the Council's approval a scheme in respect of the On Site Open Space ("the Maintenance and Management Scheme") for the future management and maintenance arrangements of the On Site Open Space (including funding arrangements for the same) which will be put in place to ensure the long term management and maintenance of the On Site Open Space to a standard which is at least as high as the standard to which the Council would maintain public open space owned or managed by it
  - 1.2 Not transfer any On Site Open Space to a Management Company until the Maintenance and Management Scheme has been approved in writing by the Council
  - 1.3 Maintain or procure the maintenance of the On Site Open Space in accordance with the approved Maintenance and Management Scheme
  - 1.4 Ensure that the Management Company shall agree to and comply with the Maintenance and Management Scheme

**THE COMMON SEAL of**

**ROBERT HITCHINS LIMITED**

was hereunto affixed in the presence of:

.....

**Director**

.....

**Director/Company Secretary**

**THE COMMON SEAL OF CHELTENHAM**

**BOROUGH COUNCIL** affixed hereto is

authenticated by the undermentioned

person by the Council to act for that purpose:

.....

**Authorised Signatory**