

Planning Obligation by Deed of Agreement under Section 106 of the Town and Country Planning Act 1990 relating to [the development of on/at]

Dated : 200...

- [Local Planning Authority] (1)
- [Local Highway Authority] (2)
- [Freeholder] (3)
- [Other Interested Person] (4)
- [Other Interested Person] (5)

1

1 **GENERAL GUIDANCE NOTE**

The objective is to provide a document which is concise, clear and comprehensive. Modern legal drafting no longer employs archaic legal terminology. Instead, it should be drafted so as to be readily understood by all interested parties.

The solicitors responsible for drafting the document need to receive clear and unambiguous instructions from their clients.

A Section 106 Planning Agreement is a legal document. It creates legal commitments which bind the original parties and their successors, and the land, and these commitments may continue for many years. It is important to remember that a Section 106 Planning Agreement will usually be negotiated in conjunction with the planning permission, which also normally runs with the land.

The document should follow a logical sequence, starting with the parties followed by an Introduction which explains the objective of the Planning Agreement, then the legal provisions that enable the local planning authority and any other public authority to enter into the planning obligations, and the operative provisions containing the obligations of the landowner and, if appropriate, the local authorities.

A Unilateral Obligation may be employed where the obligations are made by the Owner and/or the Developer without any reciprocal commitments by the local planning authority, provided that the local planning authority by whom the Planning Obligation is enforceable is identified within the Deed.

The parties negotiating the Agreement are encouraged to follow the broad format of this agreement. Where necessary, however, they may substitute the provisions (especially those in square brackets) in this standard agreement for wording specific to the development and authority. Authorities should make standard materials available to applicant.

TABLE OF CONTENTS

INTRODUCTION	1
1 DEFINITIONS	2
2 CONSTRUCTION OF THIS DEED	3
3 LEGAL BASIS	4
4 CONDITIONALITY	4
5 THE OWNER'S COVENANTS	4
6 THE COUNCIL'S COVENANTS	4
7 THE COUNTY COUNCIL'S COVENANTS	4
8 MISCELLANEOUS	5
9 MORTGAGEE'S CONSENT	5
10 WAIVER	6
11 CHANGE IN OWNERSHIP	6
12 INDEXATION	6
13 INTEREST	6
14 VAT	6
15 JURISDICTION	6
16 DELIVERY	6
FIRST SCHEDULE	7
[Details of the Owner's Title, and description of the Site]	7
SECOND SCHEDULE	8
[Form of notice of planning permission]	8
THIRD SCHEDULE	9
The Owner's Covenants with the Council	9
Transfer of property/open space/play areas/public squares/amenity space	9
Community Facilities	11
CCTV	13
Affordable Housing	14
Public Art	17
Highways Works	18
Transport Contribution	19
FOURTH SCHEDULE	20
The Owner's Covenants with the County Council	20
Education Contribution	20
FIFTH SCHEDULE	21
Council's Covenants	21
Corresponding covenant by Council where land transferred	21
SIXTH SCHEDULE	22
County Council's Covenants	22
SEVENTH SCHEDULE	23
Contract and Land Transfer	23
EIGHTH SCHEDULE	24
Highways Agreement	24
NINTH SCHEDULE	34
Specification for Community Facilities Floorspace	34
ANNEX A: Affordable housing drafting notes	36

DATE 200...

PARTIES ²

- (1) [LOCAL PLANNING AUTHORITY] of [.....insert address.....]
("Council")
- (2) [LOCAL HIGHWAY AUTHORITY] of [.....insert address.....]
("County Council")³
- (3) [FREEHOLDER] of [.....insert address.....]
("Owner")
- (4) [OTHER INTERESTED PERSON] of [.....insert address.....]
("Developer")
- (5) [OTHER INTERESTED PERSON] of [.....insert address.....]
("Mortgagee")

INTRODUCTION⁴

- 1 The Council is the local planning authority for the purposes of the Act for the area in which the Site is situated.
- 2 The County Council is the local highway authority, [and the county planning authority / the education authority] for the area in which the Site is situated.
- 3 The Owner is the freehold owner of the Site.⁵
- 4 The Developer is ⁶
- 5 The Mortgagee is ⁷

² *These are the parties who should sign the document as being interested in the land, where, "interested" has a legal meaning. The parties usually include the freeholder, any lessee(s), and the purchaser of the development site with a contract conditional upon obtaining planning permission or an option for a period of time within which the developer may obtain planning permission and then decide whether or not to purchase the land.*

Local Planning Authority – the local authority for the area where the land is situated; this may be the District Council Unitary authority, London Borough, National Park Authority or Urban Regeneration Agency.

County Council – a County Council may also be joined as a party in its role as local highway authority and/or local education authority or local planning authority in relation to waste and minerals.

Mortgagee - In an event of a default by the mortgagor, the mortgagee may take possession of the land, and therefore be liable for the commitments in the planning obligation.

³ *In unitary areas, the unitary authority will have eg the education and (for non-trunk roads) highway authority powers. Thus the agreement will need to be modified when used in such areas essentially to substitute the Council for the County, making it clear in the recitals that the Council has the County functions.*

⁴ *This section is also known as "Recitals", sets the scene for the obligations which appear later in the Agreement. The relevant role(s) of the County Council should be identified.*

⁵ *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

⁶ *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

⁷ *Recital of ownership – see s.106(9)(b) and (c) for what must be stated.*

- 6 The Owner has submitted the Application to the Council and the parties have agreed to enter into this Deed in order to secure the planning obligations contained in this Deed.
- 7 The Council resolved on [...insert date....] to grant the Planning Permission subject to the prior completion of this Deed.

NOW THIS DEED WITNESSES AS FOLLOWS:

OPERATIVE PART⁸

1 DEFINITIONS⁹

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

“1980 Act”	the Highways Act 1980
“Act”	the Town and Country Planning Act 1990
“Application”	the application for outline [full] planning permission dated [] submitted to the Council for the Development and allocated reference number []
“Agreement”	an agreement with a transfer annexed in the form set out and completed in accordance with the Seventh Schedule
“Commencement of Development”	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, demolition work, archaeological investigations, investigations for the purpose of assessing ground conditions, 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 and “Commence Development” shall be construed accordingly.
“County Engineer”[“Director”]	the Director of Engineering or his appointed representative for the time being of the County Council.
“Development”	the Development of the Site with [...insert description of the development...] as set out in the Application
“Dwelling”	a dwelling (including a house flat or maisonette) to be constructed pursuant to the Planning Permission

⁸ *These are the provisions that follow the recitals and which set out:*

- (a) *the method and means of performance of the obligations,*
- (b) *the content of the obligations.*

⁹ *Modern draftsmen include their definitions at the beginning of the operative part of the Deed, unless the document is short. A defined term should be given a capital letter wherever it subsequently appears in the document. The purpose of definitions is to remove ambiguity, and to avoid unnecessary repetition. Other definitions can be added, depending upon the terms of the obligations.*

“Highways Agreement”	an agreement for [...insert purposes...] substantially in the form set out in the Eighth Schedule with such amendments as may be agreed between the parties thereto
“Index” ¹⁰	All Items Index of Retail Prices issued by the Office for National Statistics [All In Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors or any successor organisation].
“Interest”	interest at [] per cent above the base lending rate of the [] Bank Plc from time to time.
“Occupation” and “Occupied”	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.
“Plan”	the plan attached to this Deed
“Planning Permission”	the outline[full] planning permission subject to conditions to be granted by the Council pursuant to the Application as set out in the Second Schedule.
“Property Transfer Trigger”	the restriction on occupation of more than [...specify no. of dwellings/square metres as applicable...] set out in paragraph [1] of the Third Schedule. ¹¹
“Site” ¹²	the land against which this Deed may be enforced as shown edged red on the Plan.

2 CONSTRUCTION OF THIS DEED

- 2.1 Where in this Deed reference is made to any clause, paragraph or schedule or recital such reference (unless the context otherwise requires) is a reference to a clause, paragraph or schedule or recital in this Deed.
- 2.2 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,

¹⁰ *The choice of index will depend on what is being indexed. More than one index may need to be specified.*

¹¹ *Needed if property to be transferred.*

¹² *This will usually be the same as the Application site. It should be the land against which the obligations are to be enforced.*

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 Deed 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 and County Council the successors to their respective statutory functions.

3 LEGAL BASIS¹³

- 3.1 This Deed is made pursuant to Section 106 of the Act [Section 111 of the Local Government Act 1972 and Section 2 of the Local Government Act 2000].

- 3.2 The covenants, restrictions and requirements imposed upon the Owner under this Deed create planning obligations pursuant to Section 106 of the Act and are enforceable by the Council as local planning authority against the Owner.¹⁴

4 CONDITIONALITY

This Deed is conditional upon:

- (i) the grant of the Planning Permission; and
- (ii) the Commencement of Development

save for the provisions of [Clauses 8.1, 15 and 16 legal costs clause jurisdiction and delivery clauses and any other relevant provisions] which shall come into effect immediately upon completion of this Deed.

5 THE OWNER'S COVENANTS

- 5.1 The Owner covenants with the Council as set out in the Third Schedule.
- 5.2 The Owner covenants with the County Council as set out in the Fourth Schedule.

6 THE COUNCIL'S COVENANTS

- 6.1 The Council covenants with the Owner as set out in the Fifth Schedule.

7 THE COUNTY COUNCIL'S COVENANTS

- 7.1 The County Council covenants with the Owner as set out in the Sixth Schedule.

8 MISCELLANEOUS

- 8.1 The Owner shall pay to the Council on completion of this Deed the reasonable legal costs of the Council incurred in the negotiation, preparation and execution of this Deed.

¹³ *The operative provisions should follow a logical sequence, commencing with a statement of the legal powers which are relied upon by the local planning authority when entering into this agreement. Obviously, the primary authority is Section 106 of the Town and Country Planning Act 1990, but the local planning authority may also wish to include Section 111 of the Local Government Act 1972, and Section 2 of the Local Government Act 2000. Sections 111 and 2 should be mentioned where the local planning authority is also committing to carrying out certain actions. These sections enable the local authority to deal with obligations required from the landowner, that are not within the powers of Section 106. However, unlike s.106, obligations under section 111 and 2 do not run with the land.*

¹⁴ *Standard Terms*
Formal requirement
It is necessary to state formally that the document is a planning obligation for the purposes of Section 106 of the Town and Country Planning Act 1990.

- 8.2 No provisions of this Deed shall be enforceable under the Contracts (Rights of Third Parties) Act 1999
- 8.3 This Deed shall be registrable as a local land charge by the Council.
- 8.4 Where the agreement, approval, consent or expression of satisfaction is required by the Owner from the Council or County Council under the terms of this Deed 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:
- (i) the Council by the Head of Development and Building Control;
 - (ii) the County Council by the County Director¹⁵

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.

- 8.5 Following the performance and satisfaction of all the obligations contained in this Deed the Council shall forthwith effect the cancellation of all entries made in the Register of Local Land Charges in respect of this Deed.
- 8.6 Insofar as any clause or clauses of this Deed are found (for whatever reason) to be invalid illegal or unenforceable then such invalidity illegality or unenforceability shall not affect the validity or enforceability of the remaining provisions of this Deed.
- 8.7 This Deed 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 Owner) it is modified by any statutory procedure or expires prior to the Commencement of Development.
- 8.8 No person shall be liable for any breach of any of the planning obligations or other provisions of this Deed after it shall have parted with its entire interest in the Site but without prejudice to liability for any subsisting breach arising prior to parting with such interest.
- 8.9 This Deed shall not be enforceable against owner-occupiers or tenants of dwellings constructed pursuant to the Planning Permission nor against those deriving title from them.¹⁶
- 8.10 Nothing in this Deed 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 Deed.

9 MORTGAGEE'S CONSENT

- 9.1 The Mortgagee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Site shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner.

¹⁵ *These references will need to be tailored to the authority and agreement, and the potential for job titles to change borne in mind.*

¹⁶ *Some parts of a planning agreement will need to be enforceable against owner occupiers or tenants, eg some affordable housing provisions. Consider whether this common exclusion is suitable for all parts of the agreement.*

10 WAIVER

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

11 CHANGE IN OWNERSHIP

The Owner agrees with the Council to give the Council immediate written notice of any change in ownership of any of its interests in the Site occurring before all the obligations under this Deed 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.¹⁷

12 INDEXATION

Any sum referred to in the Third [and Fourth] Schedule[s] shall be increased by an amount equivalent to the increase in the Index from the [date hereof]¹⁸ until the date on which such sum is payable.

13 INTEREST

If any payment due under this Deed is paid late, Interest will be payable from the date payment is due to the date of payment.

14 VAT

All consideration given in accordance with the terms of this Deed shall be exclusive of any value added tax properly payable.¹⁹

15 JURISDICTION

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

16 DELIVERY

The provisions of this Deed (other than this clause which shall be of immediate effect) shall be of no effect until this Deed has been dated.

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

¹⁷ Consider whether sales to owner occupier and business tenancies are to be notified. The purpose of this clause is to assist the LPA in practical monitoring. Consider also including a clause on service of notices.

¹⁸ Insert appropriate point.

¹⁹ Parties should take advice on the applicability of VAT and consequences of failure to collect if payable.

FIRST SCHEDULE²⁰

[Details of the Owner's Title, and description of the Site]

²⁰

Description of the title and the land to be bound by the Agreement. This is usually a description of the development site which is the subject of the application for planning permission.

SECOND SCHEDULE²¹

[Form of notice of planning permission]

²¹

Form of notice of planning permission. Whilst the notice of planning permission will only be issued upon the completion and exchange of the signed Section 106 Planning Obligation, good practice is to annex a draft to the document so that all terms and conditions are known.

THIRD SCHEDULE

The Owner's Covenants with the Council

Transfer of property/open space/play areas/public squares/amenity space²²

Definitions (to be included in Clause 1):

"Open Space Land"	means the land shown for identification purposes coloured [] on the Plan
"Open Space Works"	works to be carried out under paragraph [] to the Third Schedule in accordance with the Open Space Works Specification
"Open Space Works Specification"	a specification for the carrying out of Open Space Works and the maintenance specification to be agreed in writing between the Owner/Developer and the Council prior to Commencement of the Development
"Open Space Contribution"	means the sum of £..... towards the provision and/or improvement of open space facilities payable in accordance with paragraph 1 of the Third Schedule

22

Transfer of property

It is often necessary to provide for the transfer of property as a precondition of the grant of planning permission. For example, there may be play areas to be created in a residential development which the Council requires, or a community centre or public open space. Affordable housing usually also requires land to be transferred to a Registered Social Landlord. Section 106 does not expressly contemplate the transfer of land. Accordingly, either there must be a contract for the sale of land, which can be incorporated in the same document but made under other powers, or a restriction on the use or development of land must be imposed until the land has been transferred. In that case, the Owner will often wish to establish the terms for the transfer and have a commitment from the Council to acquire the land at the appropriate time, so as not to be prevented from continuing with the development should the Council fail to complete the transfer. Those provisions will constitute a contract for the sale of land and must therefore comply with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. The example clauses also address the situation where the transferee has yet to be identified.

LPAs may wish to secure areas of land to be retained for public use as amenity areas through a planning agreement. This model agreement cannot address drafting for all of them. They include:

- an area of Open Space to be dedicated for public use can be specified without identification of its exact location on the Site, but with a mechanism for its later determination*
- a specified area of the Development Site may be identified within the overall site and dedicated for public use with or without a financial contribution towards its subsequent maintenance*
- a specified area of the Development Site may be identified laid out as open space to a defined specification and dedicated for public use*
- a financial contribution may be payable to the local planning authority for provision of off-site open space, or improvement and maintenance of existing open space within a defined proximity to the Development Site, and with a positive obligation by the local planning authority to use the monies within a specified period of time, otherwise such monies or the balance of such monies should be returned to the Developer.*

In all cases care should be taken to ensure the obligations will run with the land.

A Where property to be transferred to Council

- 1 No more than [...specify no. of dwellings/square metres as applicable...] within the Development shall be Occupied unless the Owner shall have transferred to the Council the Open Space Land on the terms set out in the Seventh Schedule²³ and paid the Open Space Contribution to the Council
- 2 Prior to the transfer referred to in paragraph 1 the Owner shall carry out the Open Space Works to the satisfaction of the Council²⁴

B Alternative approach where property is to be transferred to the Council

- 1 The Owner and the Council hereby agree as follows:
- 1.1 The Owner shall sell and the Council shall buy the Open Space Land on the terms set out in the Seventh Schedule²⁵
- 1.2 Completion of the transfer of the Open Space Land referred to in paragraph 1.1 above shall take place on or before Occupation of [...specify no. of dwellings/square metres as applicable...] within the Development

C Where the transferee of land has not been identified; this is often the case for example where the land is for a nature reserve or affordable housing

- 1 No more than [...specify no. of dwellings/square metres as applicable...] within the Development shall be occupied unless prior thereto the Owner shall (by signing and sending the Agreement to the Transferee) offer to sell to the Transferee the Open Space Land which offer may be accepted by the Transferee signing and returning the Agreement to the Owner within [...specify appropriate period...] from the date of the offer in respect of which time shall be of the essence²⁶

²³ *The Seventh Schedule should set out the conveyancing terms of the sale, title, price which (will usually be a nominal amount), any provisions needed for decontamination and environmental liability, any commuted sum to be paid to the Council and the terms of the transfer. It must comply with s.2 Law of Property (Miscellaneous Provisions) Act 1989. Under this approach the restriction in this paragraph is within section 106(2) with a contract for the purchase of land which can be protected by registration at the Land Registry. This contract in the Seventh Schedule should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.*

²⁴ *If B or C is adopted, similar wording for Open Space Works and Open Space Contribution may be included.*

²⁵ *Again, the Seventh Schedule should set out the terms and the transfer. Under this approach, an estate contract is created by paragraph 1 which can be protected by registration at the Land Registry. This approach is not within the powers of section 106 and should be made under s.2 Local Government Act 2000 and s.111 Local Government Act 1972.*

²⁶ *Under this approach, a restriction within s.106(2) is created. The Seventh Schedule will set out the contract and transfer.*

Community Facilities²⁷

Definitions (to be included within clause 1):

“Community Facilities Land”	means the site of the Community Facilities shown for identification purposes only coloured [] on the Plan having an area of [] hectares and referred to in paragraph [] of the Third Schedule
“Community Facilities”	means the provision of a community hall/[health centre as shall be agreed with the local planning authority, as provided in paragraph [] of the Third Schedule
“Community Facilities Floorspace”	means not less than [] square metres of floorspace (gross external) to be provided within the Development for the purposes referred to in paragraph [] of the Third Schedule in accordance with the Specification
“Community Facilities Contribution”	means the sum of [] pounds (£[.....]) towards the provision of the Community Facilities
“Community Uses”	means [.....]
“Specification”	means the specification set out in the Ninth Schedule

- 2 The Owner [and/or the Developer] covenants and agrees:
- 2.1 to provide and lay out (including construction of buildings to at least a shell state) the Community Facilities Land in accordance with the Specification and to the Council’s satisfaction for the purpose of accommodating the Community Facilities
- 2.2 to complete the works of provision and laying out on or before [...specified number...] Dwelling[s] [is/are] made available for occupation
- 2.3 The Community Facilities Land shall only be used for one or more of the Community Uses

OR

- 2.1 to provide the Community Facilities Floorspace in the following phases:
- (a) not to Occupy more than [...specified number...] Residential Units until [...specified area...] square metres of Community Facilities Floorspace has been provided

²⁷ Generally, where a large residential development is to be carried out, some social infrastructure may be necessary. If it is necessary to secure those by the planning agreement (remember that conditions should be considered first) standard clauses are provided. In this example, Community Facilities can include a community hall, a health centre or cultural facilities, such as a library. The Community Facilities can be provided in a number of ways, for example:

- (i) identification of a site within the overall Development Site, with its subsequent transfer to the local planning authority, or other identified body;
- (ii) identification of site and construction at the Owner’s expense of necessary buildings;
- (iii) financial contribution;

Where the facilities are to be transferred to the LPA, use the provisions in paragraph 1.

(b) not to Occupy [...*specified number*...] Residential Units until [...*specified number*...] square metres of Community Facilities Floorspace has been provided

2.2 The Community Facilities Floorspace shall only be used for one or more of the Community Uses

CCTV²⁸

Definitions (to be included in clause 1):

- “CCTV” means closed circuit television covering the [...*specify public areas...*] to be provided in accordance with paragraph [] of the Third Schedule
- “CCTV Contribution” means the sum of [...*specify amount...*] indexed to be paid by the Developer/the Owner to the Council and expended by the Council in accordance with paragraph [] of the Third Schedule
- “Public Realm” means the areas open to the public [*within the town centre*] which shall be subject to surveillance by CCTV

- 3 Prior to the Commencement of the Development the Developer shall agree with the Council a detailed scheme for the installation of CCTV to monitor the [...*specify areas...*] [the Public Realm] which scheme shall include details of:
- (a) the number and location of the CCTV cameras to be installed;
 - (b) the specification of the CCTV cameras to be installed which shall be of similar standard to that of the Council's cameras
 - (c) phasing of the installation

and shall thereafter install the CCTV in accordance with the agreed scheme [and connect it to the Council's existing CCTV system]²⁹

OR

- 3 Prior to the Commencement of the Development the Developer shall pay the CCTV Contribution to the Council which shall be used by the Council to increase the CCTV monitoring capacity within the Public Realm

²⁸ With urban development sites it may be appropriate to seek a contribution towards street safety by means of the provision of CCTV.

²⁹ Developers may wish to have covenants from the Council to permit connection and to transfer ownership to the Council.

Affordable Housing³⁰

Definitions (to be included in clause 1)

“Affordable Housing”	subsidised housing that will be available to persons who cannot afford to rent or buy housing generally available on the open market;
“Affordable Housing Units”	that part of the Development comprising [.....] residential units [...describe mix of units...] together with [.....] car parking spaces shown on drawing numbers [<i>drawing references</i>]; or any one or more of them
“Chargee”	any mortgagee or chargee of the Registered Social Landlord or the successors in title to such mortgagee or chargee or any receiver or manager (including an administrative receiver) appointed pursuant to the Law of Property Act 1925 ³¹ ;
“Chargee’s Duty”	the tasks and duties set out in paragraph 4.4 to the [Affordable Housing] Part of the Third Schedule
“Market Housing Units”	that part of the Development which is general market housing for sale on the open market and which is not Affordable Housing;
“Practical Completion”	issue of a certificate of practical completion by the Owner’s architect or in the event that the Development is constructed by a party other than the Owner the issue of a certificate of practical completion by that other party’s architect;
“Protected Tenant”	any tenant who: (a) has exercised the right to acquire pursuant to the Housing Act 1996 or any statutory provision for the time being in force (or any equivalent contractual right) in respect of a particular Affordable Housing Unit (b) has exercised any statutory right to buy (or any equivalent contractual right) in respect of a particular Affordable Housing

³⁰ See also the Affordable Housing Drafting Notes.

³¹ This is a mortgagee of the RSL’s interest, not a mortgagee of an the interest of a shared owner of an Affordable Housing Unit

Unit

- (c) has been granted a shared ownership lease by a Registered Social Landlord (or similar arrangement where a share of the Affordable Housing Unit is owned by the tenant and a share is owned by the Registered Social Landlord) by the Registered Social Landlord in respect of a particular Affordable Housing Unit and the tenant has subsequently purchased from the Registered Social Landlord all the remaining shares so that the tenant owns the entire Affordable Housing Unit;

“Registered Social Landlord”

a registered social landlord as defined in Part 1 of the Housing Act 1996 who is registered with the Housing Corporation pursuant to Section 3 of that Act and has not been removed from the register pursuant to Section 4 of that Act and who is approved by the Council (such approval not to be unreasonably withheld or delayed).

4 Affordable Housing

- 4.1 No more than [.....] of Market Housing Units shall be Occupied until all of the Affordable Housing Units have been constructed in accordance with the Planning Permission and made ready for residential occupation and written notification of such has been received by the Council.
- 4.2 From the date of Practical Completion of the Affordable Housing Units they shall not be used other than for Affordable Housing save that this obligation shall not be binding on:
 - 4.2.1 any Protected Tenant or any mortgagee or chargee of the Protected Tenant or any person deriving title from the Protected Tenant or any successor in title thereto and their respective mortgagees and chargees; or
 - 4.2.2 any Chargee provided that the Chargee shall have first complied with the Chargee’s Duty
 - 4.2.3 any purchaser from a mortgagee of an individual Affordable Housing Unit pursuant to any default by the individual mortgagor.
- 4.3 No more than [...insert %...] of the Market Housing shall be Occupied until the Affordable Housing Units have been transferred to the Registered Social Landlord on terms that accord with relevant

Housing Corporation funding requirements current at the date of construction of the Affordable Housing Units.³²

4.4 the Chargee shall prior to seeking to dispose of the Affordable Housing Units pursuant to any default under the terms of its mortgage or charge shall give not less than [] months' prior notice to the Council of its intention to dispose and:

- (a) in the event that the Council responds within [] months from receipt of the notice indicating that arrangements for the transfer of the Affordable Housing Units can be made in such a way as to safeguard them as Affordable Housing then the Chargee shall co-operate with such arrangements and use its best endeavours³³ to secure such transfer
- (b) if the Council does not serve its response to the notice served under paragraph 4.4.(a) within the [] months then the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule
- (c) if the Council or any other person cannot within [] months of the date of service of its response under paragraph 4.4(a) secure such transfer then provided that the Chargee shall have complied with its obligations under paragraph 4.4(a) the Chargee shall be entitled to dispose free of the restrictions set out in this Part of the Third Schedule

PROVIDED THAT at all times the rights and obligations in this paragraph 4.4 shall not require the Chargee to act contrary to its duties under the charge or mortgage and that the Council must give full consideration to protecting the interest of the Chargee in respect of moneys outstanding under the charge or mortgage

OR

Definition (to be included in Clause 1)

"Affordable Housing Land" means the land shown edged [green] on the Plan.

4.1 No more than [...insert %...] of the Market Housing Units shall be Occupied until the Affordable Housing Land has been transferred to the Registered Social Landlord for nil value with the benefit of the following:³⁴

4.1.1 full and free rights of access both pedestrian and vehicular from the public highway to the Affordable Housing Land;

4.1.2 full and free rights to the passage of water soil electricity gas and other services through the pipes drains channels wires cables and conduits which shall be in the adjoining land up to

³² See land transfer provisions if this clause is adopted.

³³ It is recognised that there can be room for negotiation on this standard. As with any property acquisition it will be necessary to consider whether any other easements and provisions will be necessary, for example obligations to maintain roads pending adoption

³⁴ See land transfer provisions if this clause is adopted.

and abutting the boundary to the Affordable Housing Land all such services to be connected to the mains.

Public Art

Definitions (to be included in clause 1):

“Public Art Contribution” means a financial contribution of [] pounds (£[.....]) towards the provision of public art such provision to be entirely at the discretion of the Council in terms of size nature artistic influence and geographical location within the [Council area, or specified area]

Alternative definition:

“Public Art Contribution” means a financial contribution of [] pounds (£[.....]) towards the provision of Public Art which will include where appropriate sculpture, street furniture, landscaping and/or architectural detailing within [specify area] [within or within the vicinity of the Development as the Owner and Council may agree]

“Public Art” means [.....]

5 To pay the Public Art Contribution within [...insert number to be specified...] days of the Commencement of Development

OR

5.1 To include as part of the Development a permanent work of Public Art to the value of the Public Art Contribution which is integral to the Development and permanently affixed to the Development Land the precise nature of the work of art and its precise location on the Development Land to be approved by the Council prior to Occupation of any part of the Development

5.2 The said work shall be provided on or before [...specify date or event...]

Highways Works³⁵

6 Not to Commence the Development prior to entering into the Highways Agreement with the County

³⁵ *New highways for both vehicular and/or pedestrian use, or improvements to existing public highways are frequently required as part of a development involving building operations, and whilst separate statutory powers to enter into agreements to secure either new highways which are subsequently adopted as maintainable by the public or to permit alterations to existing public highways exist in highways legislation, it is normal to include the principles of these highway obligations in a Section 106 Agreement. with the form of the necessary agreement under the highways legislation set out in a Schedule to the Section 106 Agreement. It may be desirable to include this covenant in the Fourth Schedule as a covenant with the County.*

Transport Contribution

Definitions (to be included in clause 1):

“Transport Contribution” means the contribution of [] pounds (£[.....]) to be paid to the Council to provide the Transport Facilities

“Transport Facilities” means [...describe any facilities required...]

7.1 To pay to the Council the Transport Contribution towards the provision of the Transport Facilities within [] days of the Commencement of Development

7.2 To undertake and complete the Transport Facilities prior to Occupation of [...insert number...] Residential Unit(s)³⁶

³⁶ *If the facilities are off-site highway improvements a separate agreement with the highway authority under s.278 Highways Act 1980 will be necessary prior to execution of the works. Consider also dedication adoption and long term ownership and maintenance. Consider whether this should be a covenant with the County in the Fourth Schedule.*

FOURTH SCHEDULE

The Owner's Covenants with the County Council

Education Contribution³⁷

Definitions (to be included in clause 1):

"Education Contribution" means the sum of [] pounds (£[.....]) to provide additional educational facilities within the [...specify Council area...] required as a consequence of the Development

OR

"Primary School Contribution" means the sum of [] pounds (£[.....]) towards the cost of providing additional places at existing primary schools within the [...specify local education within the [...specified area...]

"Secondary School Contribution" means the sum of [] pounds (£[.....]) towards the cost of providing additional places at existing secondary schools serving the [...specify area...]

"School Contribution" means the total of the Primary School Contribution and the Secondary School Contribution towards the cost of providing other improvements to existing schools serving the [...specify area...]

Covenants

1 To pay the Education Contribution to the Council in its capacity as local education authority [to the County Council in its capacity as local education authority] prior to Occupation of [...specify number of units...] [or within [] months of the Commencement of Development]

³⁷

A contribution towards education facilities within the area may be required. The extent of such contribution will depend upon the number of residential units to be provided and the size and extent of the Development. Any financial contribution may also be made in kind by the transfer of land and/or the construction of a school building. If transfer of a site for a school is required use paragraph 1

FIFTH SCHEDULE

Council's Covenants

Corresponding covenant by Council where land transferred

- 1 The Council agrees to execute the transfer of the property on or before the Property Transfer Trigger on the terms set out in the Seventh Schedule failing which the restriction set out in paragraph 1 of the Third Schedule shall cease to have effect.

Repayment of contributions

- 2 The Council hereby covenants with the Owner to use all sums received from the Owner under the terms of this Deed for the purposes specified in this Deed for which they are to be paid or for such other purposes for the benefit of the Development as the Owner and the Council shall agree.
- 3 The Council covenants with the Owner that it will pay to the Owner such amount of any payment made by the Owner to the Council under this Deed which has not been expended in accordance with the provisions of this Deed within [five] years of the date of receipt by the Council of such payment together with interest at the [...insert name of bank...] base rate from time to time for the period from the date of payment to the date of refund.
- 4 The Council shall provide to the Owner such evidence, as the Owner shall reasonably require in order to confirm the expenditure of the sums paid by the Owner under this Deed.

Open Space Land³⁸

- 5 The Council [the Transferee] shall neither use nor permit to be used the Open Space Land other than as amenity areas for the use of the public without the prior written consent of the Owner.

Community Facilities

- 6 The Council shall neither use nor permit to be used the Community Facilities Land other than for the purposes referred to in paragraph [] of the [.....] schedule.

Discharge of obligations

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

³⁸ *These restrictive covenants may be moved to the Seventh Schedule (Contract and Land Transfer)*

SIXTH SCHEDULE

County Council's Covenants³⁹

- 1 The County Council hereby authorises the Owner's approved contractor to carry out such parts of the Highway Works as are within the public highway at the date of this Deed in accordance with the terms and stipulations contained in this Deed.

³⁹ Consider whether any of the Council's covenants in the Fifth Schedule are applicable to the County Council and include accordingly.

SEVENTH SCHEDULE

Contract and Land Transfer

EIGHTH SCHEDULE
Highways Agreement⁴⁰

DATE 2005

PARTIES

- 1 [LOCAL HIGHWAY AUTHORITY] of [.....*insert address*.....]
("County Council")
- 2 [FREEHOLDER] of [.....*insert address*.....]
("Owner")
- 3 [DEVELOPER]⁴¹ of [.....*insert address*.....]
("Developer")
- 4 [OTHER INTERESTED PERSON] of [.....*insert address*.....]
("Mortgagee")

INTRODUCTION⁴²

- 1 The County Council is the local highway authority for the area in which the Site is situated.
- 2 The Owner is the freehold owner of the Site.
- 3 The Developer intends to develop the Site pursuant to the Planning Permission and has entered into [an option with the Owner for the acquisition of the Site]
- 4 The Mortgagee is the mortgagee under a mortgage dated [] of the Owner's interest in the Site
- 5 The Highways Works are required by the Planning Agreement and the County Council has agreed to adopt them in accordance with this agreement
- 6 [Recite any other relevant background to assist understanding of the agreement]

NOW THIS DEED WITNESSES AS FOLLOWS:

1 DEFINITIONS

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

- "Bond" means a bond for securing the performance of its obligations (as to the Highway Works) in this Deed such bond to be in the form contained in the First Schedule and with a Bondsman approved by the County Council and in a sum equal to the sum estimated by the Director to be the reasonable cost to the County Council of carrying out the Highway Works
- "Completion Certificate" means the provisional certificate of completion issued by the Director when the Highway Works have been completed to his satisfaction

⁴⁰ Highway Authorities may wish to insert their own model agreement under s.38 Highways Act 1980. A sample is set out below.

⁴¹ Consider whether necessary to include Developer

⁴² This section is also known as "Recitals", sets the scene for the obligations which appear later in the Agreement.

“Director”	means the Director of Environment and Property Services from time to time of the County Council and in the event that the post is abolished the holder of the post responsible for the County Council’s functions relevant to the particular context in this Deed to which the term relates or an officer duly authorised on his or her behalf
“Drawings”	means those drawings showing an outline indication of the Highway Works dated [] and referenced [.....].
“Highway Works”	means: <ul style="list-style-type: none"> (a) the works described in the [.....] Schedule (b) such other ancillary works as the County Council may reasonably require (c) any accommodation works and (d) works which may as a consequence of (a) (b) or (c) be necessary to statutory undertakers' and telecommunications apparatus and all other equipment under in or over the highway (e) any variation to (a) (b) (c) or (d) as agreed between the parties in writing
“Letter of Technical Approval”	means written confirmation from the County Council that all matters concerning the Highways Work have been agreed
“Liquidated Damages”	means a sum calculated and falling due in accordance with clause 4 being a sum arising from the Owner’s delay and not a penalty
“Maintenance Certificate”	means the final certificate of completion issued by the Director after the Completion Certificate has been issued and the Highway Works have been maintained for the Maintenance Period to the satisfaction of the Director in accordance with clause 3.4
“Maintenance Period”	means the period of twelve months from the issue of the Completion Certificate
“Planning Agreement”	means the planning agreement dated [] made between [.....]
“Programme”	means a programme and method statement for carrying out the Highway Works
“Rate of Liquidated Damages”	means the sum of £.....per day/week such sum being a conclusive and agreed estimate between the parties of the damages likely to be suffered by the County Council if the whole of the Highway Works is not completed by the date prescribed in accordance with clause 3.1

Words and phrases defined in the Planning Agreement shall have the same meaning in this Agreement

2 The Owner covenants and agrees with the County Council:

2.1 to undertake and complete the Highway Works in accordance with clauses 2.2 and 2.4 prior to Occupation of [.....] Dwellings and not to allow more than [.....] Dwellings to be Occupied until the Highway Works are completed] [or within [] months of Commencement of Development and to shall notify the County Council in writing within seven days of completion of the same

- 2.2
- (a) to obtain a licence and approval from the County Council prior to commencing works on the highway
 - (b) at its expense to carry out the Highway Works
 - (c) before commencing any part of the Highway Works to submit to the County Council for approval:
 - (i) such additional detailed drawings plans and specifications as the Director may require
 - (ii) a plan showing existing/additional highways including the route of any drains
 - (iii) the name and address of the Contractor whom the Owner proposes to employ for carrying out the Highway Works and all insurance details of that Contractor that the County Council may require from time to time
 - (iv) the Programmeand not to commence any part of the Highway Works until he receives the Letter of Technical Approval
 - (d) not to permit any building constructed on the Site to be Occupied or used for trading until the matters contained in the Second Schedule have been carried out to permit vehicular traffic to enter and leave the Site safely
 - (e) not to permit any vehicular traffic to enter or leave the Site other than by way of the new access or egress route provided by the Highway Works once the same is brought into use save only that during construction of the Highway Works an alternative route agreed with the Director may be used and this alternative route shall be closed off and its use discontinued immediately once the use of the new access or egress route provided by the Highway Works is brought into use as aforesaid
 - (f) to complete the Highway Works in accordance with the Drawings the Programme the Letter of Technical Approval and any other plans drawings and specifications approved under clause 2.2(c) and any instructions as to the materials or method of working given by the Director to his reasonable satisfaction and obtain the Completion Certificate in accordance with clause 3.3 no later than the date set by him under clause 3.1 save only that if the completion by such date becomes impossible by reason of circumstances beyond the control of the Owner the date for completion shall be such later date as may be agreed having regard to the circumstances
 - (g) to employ the Contractor approved under clause 2.2(c)(iii) for carrying out the Highway Works and give to the County Council adequate contact details for the Contractor so as to enable the Contractor to be contacted at all hours of each day and each night
 - (h) to provide wheel-cleaning facilities of a nature approved by the County Council on the Site before commencing any part of the Highway Works and to ensure that during the period from the commencement of the Highway Works until the issue of the Completion Certificate under clause 3.3 or such later date as the County Council shall notify in writing to the Owner before leaving the Site the wheels of all vehicles are sufficiently cleaned to prevent mud from the Site being deposited on the highway PROVIDED THAT any later date notified by the County Council as aforesaid shall not be later than such date as it considers that a stage of development on the Site will have been reached when there will no longer be a risk of mud being deposited on the highway in consequence of construction work being carried out on the Site

- (i) if required by the County Council so to do to provide temporary traffic signal controls such controls to be of a type which meet Department of Transport requirements
- (j) to construct all drains and sewers to the current standards from time to time of the adopting authority
- (k) to comply with all other terms and conditions of this Agreement

2.3 Before any part of the Highway Works are begun the Owner shall:

- (a) serve on the County Council not less than two weeks notice subsequent to the issue of the Letter of Technical Approval of its intention to commence the Highway Works
- (b) enter into and complete the Bond not later than the date for commencement of the Highway Works the Bond to be cancelled when the Highway Works have become maintainable at the public expense in accordance with clause 3.5
- (c) pay to the County Council a sum equal to [%] of the sum estimated by the Director to be the cost of the Highway Works towards the administrative and technical expenses incurred by the County Council, including the cost of supervising and inspecting the Highway Works as they proceed and the issue of the Completion and Maintenance Certificates
- (d) make all necessary arrangements for carrying out the Highway Works including the service of any necessary notices under the provisions of the New Roads and Street Works Act 1991 and in particular in relation to statutory undertakers' and telecommunications apparatus and all other equipment over or under the highway and for enabling it to comply with the provisions of this Agreement

2.4 The Owner shall throughout the period from the commencement of the Highways Works until the issue of the Completion Certificate under clause 3.3 or such later date as the County Council shall notify in writing to the Owner ensure that:

- (a) adequate warning signs lights and cones are provided and maintained in good working order in accordance with chapter 8 of the Traffic Signs Manual published by her Majesty's Stationery Office
- (b) any mud from the Development or the Highway Works which may be deposited on the highway maintainable at the public expense by vehicles leaving the Development Land or the Highway Works is removed immediately
- (c) any temporary traffic signal controls required by the County Council under clause 2.2(i) are maintained in proper working order

2.5 (a) If at any time during the period specified in clause 2.4 the Owner fails to provide adequate warning signs lights or cones or any such provided are not in good working order or mud is deposited on the highway maintainable at the public expense and not immediately removed the County Council may take such action as it considers necessary to remedy the failure and shall deduct the full cost of so doing including materials plant transport and labour from the sum deposited by the Owner pursuant to clause 2.11(a)

- (b) On each and every occasion when the County Council takes action as provided in this clause 2.5 or responds to a justifiable complaint he shall be entitled to deduct from the sum deposited under clause 2.11 (a) the sum of fifty pounds or 15% of the cost of the action taken whichever is the greater in respect of his administrative costs in addition to the cost of any action taken in remedying the failure

- (c) If any deductions which shall be made under clause 2.5(a) and 2.5(b) exceed the sum deposited or any balance thereof the Developer [and/or the Owner] shall pay to the County Council the shortfall within 21 days of the County Council serving notice of the amount due
- 2.6 Until the issue of the Maintenance Certificate pursuant to clause 3.4 the Owner hereby grants to the County Council their servants and agents
 - (a) free access to every part of the Highway Works for the purposes of inspecting the same as they proceed and inspecting and testing all materials used or intended to be used therein and the cost of reasonable analysis and test in connection therewith shall be at the expense of the Owner
 - (b) the right to enter upon such parts of the Site as it is necessary so to do in furtherance of the terms of this Agreement
- 2.7 Without prejudice to any other remedy of the County Council in the event of any default by the Owner in preparing for or carrying out the Highway Works or any failure by the Owner to comply with any requirement of the County Council in relation to the Highway Works the County Council may do all such things including the preparation of plans drawings and specifications and the carrying out of or remedying defects in works as they may deem necessary to secure proper construction of the Highway Works and the Owner shall pay to the County Council the full cost of taking such action including all design supervision construction and administrative costs PROVIDED ALWAYS that before taking any such action as aforesaid the County Council shall give to the Owner written notice of the matter in default and shall take no action thereon until twenty-eight days from the date of such notice shall have elapsed without the Owner or its successors in title remedying fully the matter in respect of which the default has arisen
- 2.8 This Agreement does not authorise interference with statutory undertakers' apparatus or works without their consent nor the installation or use of telecommunication apparatus without the consent of the owner nor entry upon nor doing works to or on any land other than the highway
- 2.9 The Developer [and/or the Owner] hereby undertakes and agrees with the County Council that in the event of any claim for compensation or otherwise or costs or charges arising in connection with or incidental to or in consequence of the carrying out of the Highway Works including any such whether mandatory or discretionary which may be incurred by virtue of any enactment or statutory instrument and not otherwise hereby provided it will hold the County Council fully indemnified from and against all claims charges costs and expenses in connection therewith or arising thereout
- 2.10
 - (a) All consideration given in accordance with the terms of this Agreement shall be exclusive of any VAT properly payable in respect thereof
 - (b) If at any time VAT becomes chargeable in respect of any supply made in accordance with the terms of this Agreement then to the extent that VAT had not previously been charged in respect of that supply the person making the supply shall have the right to issue a VAT invoice to the person to whom the supply was made and the VAT shall be paid accordingly
- 2.11 The Owner shall pay to the County Council immediately on demand
 - (a) before any part of the Highway Works are begun the sum of [] pounds (£[.....]) in respect of costs which may be incurred by the County Council by virtue of clause 2.5
 - (b) the County Council's full legal and administrative costs incurred in the preparation and/or making of temporary traffic regulation orders whether implemented or not to regulate traffic entering or leaving the Site or otherwise occasioned or necessitated by construction of the Development and the full cost of such traffic signs and markings

(including labour costs) as the County Council shall deem necessary to give effect to the same as and when any costs have been incurred and within 28 days of receipt by the Owner from the County Council of invoices therefor

(c) the Liquidated Damages

3 The County Council hereby covenants with the Owner as follows:

3.1 The County Council shall set the date for completion of the Highway Works having due regard to the Programme and shall confirm such date in writing to the Owner at the same time as issuing his Letter of Technical Approval

3.2 The County Council shall repay to the Owner no later than twenty-eight days following the date of the Completion Certificate issued pursuant to clause 3.3 or such later date as the County Council shall have notified under clause 3.1 the sum deposited under clause 2.11(a) or such part thereof as has not been expended pursuant to clause 2.5

3.3 When the Highway Works have been completed in accordance with clause 2.2 including all works described in the Second Schedule to his satisfaction the County Council shall issue the Completion Certificate and thereafter the Owner shall continue to maintain the Highway Works until the Maintenance Certificate is issued in accordance with clause 3.4

3.4 The Maintenance Certificate shall be issued by the County Council when the following conditions have been satisfied:

(a) the Maintenance Period has elapsed

(b) all defects that may have become apparent during the Maintenance Period have been remedied and made good by the Owner at its own expense and to the satisfaction of the County Council such defects to include damage or excessive wear caused to the Highway Works during the Maintenance Period

(c) the cleansing of all sewers gullies catchpits and manholes and the sweeping of the carriageway and footpaths and the cutting of grass to the reasonable satisfaction of the County Council

(d) the Highway Works have been directly connected to a carriageway which is a highway maintainable at the public expense

(e) the Highway Works have been provided with proper street lighting traffic signs road markings and street name plates and furniture to the reasonable satisfaction of the County Council

(f) that any damage to the Highway Works howsoever caused including (without limitation) acts of third parties has been remedied by the Owner at the Developer at the Owner's cost

(g) where the surface water sewers other than gullies and connections draining the Highway Works are to be vested in and under the control of the County Council or the Water Authority in accordance with the provisions of the Water Industry Act 1991 written confirmation has been received by the County Council from the appropriate authority that the sewers have been constructed to their satisfaction and have been adopted by that authority

(h) the Owner has delivered to the County Council drawings in a format as required by the County Council which the County Council agrees (such agreement not to be unreasonably withheld) show the Highway Works as constructed

- (i) the Owner has delivered to the County Council the Health and Safety file in relation to the Highway Works in accordance with the Construction (Design and Management) Regulations 1994
 - (j) the Owner has undertaken any remedial works as required by a Stage 3 Safety Audit
- 3.5 The County Council shall from the date of the Maintenance Certificate maintain that part of the Highway Works which constitute alterations and additions to the existing publicly maintainable highway and adopt the remaining Highway Works as part of the highway maintainable at the public expense
- 3.6 Upon the issue of the Completion Certificate the County Council agrees that the Bond shall be reduced by 90%
- 3.7 The County Council shall not settle or agree any amount of compensation to be paid by the County Council as Highway Authority in consequence of any claims made in respect of the Highway Works without first notifying the Owner of such claim, providing the Owner with details of such claim and taking into account any representations made by the Owner
- 3.8 Not to unreasonably withhold or delay any approval consent expression of satisfaction or agreement required under the terms of this Agreement⁴³
- 4 The Owner and the County Council agree as follows:
- 4.1 that in the event the Owner has not completed the Highway Works by the date prescribed by the County Council in accordance with clause 3.1 then Liquidated Damages shall become due at the Rate of Liquidated Damages
 - 4.2 that Liquidated Damages payable by the Owner to the County Council shall be the sum equivalent to the Rate of Liquidated Damages applied for each whole day/week for the period between the date prescribed in accordance with clause 3.1 and the date that the Highway Works are actually completed up to a maximum of £[.....]
 - 4.3 that the date of actual completion of the Highway Works (for the purposes of calculating Liquidated Damages under this clause 4 only) shall be the date that the County Council deems it appropriate that the Completion Certificate can be issued whether or not the Completion Certificate is actually issued on that date
- 5 [The Mortgagee acknowledges and declares that this Deed has been entered into by the Owner with its consent and that the Site shall be bound by the obligations contained in this Deed and that the security of the mortgage over the Site shall take effect subject to this Deed PROVIDED THAT the Mortgagee shall otherwise have no liability under this Deed unless it takes possession of the Site in which case it too will be bound by the obligations as if it were a person deriving title from the Owner].

FIRST SCHEDULE

BY THIS BOND (Company Registration Number) whose registered office is situate at ("the Owner")⁴⁴ and [...insert name of surety...] (Company Registration Number) whose registered office is situate at [...insert address...] ("the Surety") and their respective successors in title and

⁴³ Some Council's prefer to have absolute control in relation to some matters. They should be excepted from this clause.

⁴⁴ Add developer is a party to the Highways Agreement

assigns are bound jointly and severally to the [.....] COUNCIL [...insert address...]
("County Council") for the payment to them of the sum of Pounds (£)

EXECUTED AS A DEED this day of

WHEREAS

- 1 By an agreement dated [...insert date...] relating to [...insert site name...] [and highway works in the vicinity of insert site if this is appropriate] and made between [...insert parties...] and [...insert council name...] County Council ("the Agreement") the Developer [and/or the Owner] covenanted with the Council to carry out the Highway Works as defined and referred to in the Agreement
- 2 It is intended that this Bond shall be construed as one with the Agreement
- 3 The Owner is to carry out the Highway Works as detailed in the Agreement and this Bond is in respect of those Highway Works only as detailed
- 4 At the time of entering into this Bond and on the faith thereof the Surety has agreed to concur with the Owner in this Bond for the due performance and fulfilment of the Highway Works by the Owner as defined and referred to in the Agreement

NOW THE CONDITION of the above written Bond is such that if the Owner his successors and assigns shall carry out the Highway Works as defined and referred to in the Agreement or if on default by the Developer [and/or the Owner] the Surety shall satisfy and discharge the sums due from and payable by the Developer [and/or the Owner] to the Council under the Agreement up to the amount of Pounds (£.....) Then the above written Bond shall be void OTHERWISE to continue in full force and the giving by the Council of any extension of time for the carrying out of the Highway Works as defined and referred to in the Agreement or anything therein mentioned or contained and on the part of the Owner to be performed or fulfilled or any other forgiveness or forbearance on the part of the County Council to the Owner or its successors or assigns shall not in any way release the Surety from the Surety's liability under the above written Bond

THE COMMON SEAL of)
[INSERT NAME OF OWNER])
was hereunto affixed in the presence of:)

Director

Secretary

THE COMMON SEAL OF)
[...insert name of surety...])
was hereunto affixed in the presence of:)

Director

Secretary

SECOND SCHEDULE

Carry out the following highway improvement works and construction of new highway as generally indicated on the Drawings

- 1 Reshape existing carriageway
- 2 Provide highway drainage
- 3 Carry out alterations to existing street lights, provide and erect new as necessary
- 4 Provide road markings, signs and bollards as necessary
- 5 Re-grade and re-seed highway verge where necessary to the reasonable satisfaction of the Director
- 6 All highway drainage
- 7 All other drainage contained in the highway
- 8 All kerbing including kerb foundations and where appropriate including lowering at vehicle crossings and pram-ramps.
- 9 Carriageway sub-base road base and any supporting structures thereto, carriageway base course
- 10 Vision splays and verges
- 11 Pedestrian ways
- 12 Street lighting and street furniture
- 13 Temporary traffic management
- 14 Carriageway wearing course
- 15 Permanent road marking
- 16 Street name plates
- 17 Construction details of the road or roads
- 18 Provide to the Council:
 - (a) As built plans showing the position of services within the road or roads including connections up to the back of footway edging
 - (b) As built plans showing the surface water drainage for the road or roads
 - (c) Plans showing the position of street lighting columns and the associated service cables
 - (d) A method statement from the contractors
 - (e) Stage 1 2 and 3 safety audits

(Execution of Highways agreement)

THE COMMON SEAL of)
[...insert name of owner...])
was hereunto affixed in the presence of:)

Director

Secretary

THE COMMON SEAL of)
[...insert name of developer...])
was hereunto affixed in the presence of:)

Director

Secretary

THE COMMON SEAL OF)
[...insert name of surety...])
was hereunto affixed in the presence of:)

Director

Secretary

NINTH SCHEDULE

Specification for Community Facilities Floorspace

(Execution of s.106 agreement)

THE COMMON SEAL OF [Local Planning Authority])
was affixed in the presence of:)

Authorised Signatory:

THE COMMON SEAL OF [County Council])
was affixed in the presence of:)

Authorised Signatory:

EXECUTED AS A DEED by [...insert name of owner...])
in the presence of:)

Director:

Director/Secretary:

[...add Developer, mortgagee and any other parties as appropriate...]

Annex A: AFFORDABLE HOUSING DRAFTING NOTES

Simple straightforward affordable housing provisions have been included in this model. In practice there are many more elaborate arrangements sought by planning authorities and developers. Examples of the issue include

- 1.1 A mix of dwelling types
- 1.2 Restrictions on the types of occupiers (such as key workers)
- 1.3 Nomination rights in favour of a planning authority
- 1.4 Protection for the developer if an RSL cannot be found which is willing to take the affordable housing
- 1.5 A requirement for particular tenures

Ideas and requirements in affordable housing are developing and it has to be acknowledged that generally accepted drafting has not yet emerged. The following drafting principles and observations can however be stated.

- 1 Obligations should be drafted so as to fall within section 106 or they will not be enforceable against persons deriving title from the original covenantor and there may also be difficulties enforcing against the original covenantor.
- 2 There may be another consequence of drafting an obligation which falls outside section 106, as an unenforceable obligation may make the permission itself vulnerable to judicial review.
- 3 It should be borne in mind that obligations under section 106 last in perpetuity unless varied pursuant to section 106A or section 106B or unless drafted with some limitation.
- 4 A mix of dwelling types (e.g. two bedroom units or three bedroom units) can be achieved by an obligation requiring specified operations to be carried out over the land (section 106(1)(b)) or by a restriction on occupation unless the mix is achieved, pursuant to section 106(1)(a).
- 5 A requirement for occupation by types of occupiers can be achieved by a restriction on use by anyone other than those occupiers (section 106 (1)(a)).
- 6 A simple requirement that an RSL gives nomination rights to the local planning authority will not fall within section 106. However, a restriction on occupation other than by a person chosen pursuant to a nomination agreement in a form annexed to the agreement would fall within section 106 (1)(a).
- 7 A simple obligation that dwellings are only disposed for example by way of shared equity leases or assured tenancies will not fall within section 106. An approach linked to a restriction on occupation will fall within s.106 but in formulating any additional controls local authorities should be mindful of any genuine commercial or practical difficulties.
- 8 Mortgagees of affordable dwellings may have requirements for what is acceptable to them in order to protect their interests in securing the repayment of the loan. Restrictions on assignment which affect the value and realisability of an affordable dwelling may reduce the availability of mortgages. Reasonable time limits for exercise of nomination rights and fallback into the open market in the case of failure to nominate are among the potential solutions
- 9 It will often be possible to overcome mortgagee objections by providing that restrictions do not apply to mortgagees in possession of individual units or sales by them. Paragraph 4.2.3 of the affordable housing section of the Third Schedule addresses this.
- 10 Whilst it is common to exclude residential owner occupiers and lessees from some liabilities in planning agreements a rigid requirement by mortgagees (or any party to the agreement) that section 106 agreements do not apply at all to owner occupiers or lessees will undermine for example provisions restricting occupation to key workers and restrictions on occupation of more than a given number of houses pending provision of affordable housing or other facilities.
- 11 Section 27A of the Housing Act 1996 was introduced by the Housing Act 2004. It allows the Housing Corporation to make grants to persons other than Registered Social Landlords, such as developers with the intention of widening the pool of potential providers of social housing. The regulations and arrangements for implementing these powers have (as at January 2006) not yet been made. When they are, local authorities will need to consider how to adapt the affordable housing provisions for the wider range of bodies able to provide affordable housing.